No. 14-1375

Title:	CRST Van Expedited, Inc., Petitioner
	v.
	Equal Employment Opportunity Commission
Docketed:	May 20, 2015
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(13-3159)
Decision Date:	December 22, 2014
Rehearing Denied:	February 20, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
May 19 2015	Petition for a writ of certiorari filed. (Response due June 19, 2015)
Jun 10 2015	Order extending time to file response to petition to and including July 20, 2015.
Jun 19 2015	Brief amici curiae of The Equal Employment Advisory Council, et al. filed.
Jul 10 2015	Order extending time to file response to petition to and including August 19, 2015.
Aug 17 2015	Order further extending time to file response to petition to and including September 18, 2015.
Sep 16 2015	Order further extending time to file response to petition to and including October 19, 2015.
Oct 19 2015	Brief of respondent Equal Employment Opportunity Commission in opposition filed.
Nov 3 2015	Reply of petitioner CRST Van Expedited, Inc. filed.
Nov 4 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 4 2015	Petition GRANTED.
Jan 4 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Jan 19 2016	Joint appendix filed. (Two Volumes) (Statement of costs filed)
Jan 19 2016	Brief of petitioner CRST Van Expedited, Inc. filed.
Jan 19 2016	Supplemental joint appendix volume filed.
Jan 25 2016	Brief amicus curiae of Americans for Forfeiture Reform filed.
Jan 25 2016	Brief amici curiae of Bass Pro Shops Outdoor World, LLC, et al. filed.
Jan 26 2016	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Jan 26 2016	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jan 29 2016	SET FOR ARGUMENT ON Monday, March 28, 2016
Feb 8 2016	Record requested from U.S.C.A. 8th Circuit.
Feb 17 2016	Record received from U.S.C.A. 8th Circuit. (2 Boxes)
Feb 18 2016	Brief of respondent Equal Employment Opportunity Commission filed.
Feb 23 2016	CIRCULATED.
Mar 10 2016	Reply of petitioner CRST Van Expedited, Inc. filed. (Distributed)

Mar 28 2016	Argued. For petitioner: Paul M. Smith, Washington, D. C. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D.C.
May 19 2016	Judgment VACATED and case REMANDED. Kennedy, J., delivered the opinion for a unanimous Court. Thomas, J., filed a concurring opinion.
Jun 20 2016	JUDGMENT ISSUED
Jul 18 2016	Records from the U.S.C.A. 8th Circuit has been returned.

14-1375

Supreme Court, U.S.
FILED
MAY 19 2015
OFFICE OF THE CLERK

No. 14-____

IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 19, 2015

QUESTION PRESENTED

Whether a dismissal of a Title VII case, based on the Equal Employment Opportunity Commission's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of a attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k)?

PARTIES TO THIS PROCEEDING

The only two parties to this proceeding are identified in the case caption on the cover.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner CRST Van Expedited, Inc. is the wholly owned subsidiary of its parent corporation, CRST International, Inc., which is a privately held corporation. No publicly held corporation owns any of CRST Van Expedited, Inc.'s or CRST International, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner CRST Van Expedited, Inc. ("CRST") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 774 F.3d 1169 (8th Cir. 2015). Pet. App. 1a. The opinion of the United States District Court for the Northern District of Iowa is unreported but is available at 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013). Pet. App. 33a. The Eighth Circuit's opinion issued on EEOC's first appeal in this case that decided liability issues is reported at 679 F.3d 657 (8th Cir. 2012). Pet. App. 86a. The original district court dismissal decision is unreported but is available at 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa Aug. 13, 2009). Pet. App. 164a.

JURISDICTION

The Eighth Circuit denied petitioner's timely petition for rehearing *en banc* on February 20, 2015. Pet. App. 218a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee

(including expert fees) as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

Section 706 of Title VII, 42 U.S.C. § 2000e-5, provides in pertinent part that:

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the

Commission is authorized to take action with respect to the charge.

***

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

STATEMENT

CRST seeks review of the Eighth Circuit's reversal of the award of fees and costs it won after prevailing in a massive sexual harassment case brought by the Equal Employment Opportunity Commission ("EEOC") under Title VII. The EEOC alleged that many female drivers employed by CRST, a long-haul trucking firm, had experienced sexual harassment on the job and that the company had violated Title VII by tolerating this behavior. The Commission sought class-wide injunctive relief and punitive damages and also compensatory damages for individual female drivers. The district court granted summary judgment for CRST, in part because the EEOC had failed to engage in any form of pre-suit investigation, reasonable cause determination, or conciliation extending beyond the claims of just two alleged victims. The Eighth Circuit affirmed the grant of summary judgment, agreeing that

the Commission had "wholly failed" to satisfy its pre-suit obligations. Pet. App. 115a-116a.

Notwithstanding that conclusion, when the district court awarded fees and costs to CRST as a prevailing defendant as to the claims dismissed for EEOC's failure to satisfy Title VII's pre-suit requirements, the Eighth Circuit reversed. It did so not because it disagreed about the unreasonableness of the EEOC's conduct but because the Eighth Circuit applies a rule limiting civil rights fee awards to cases involving rulings "on the merits." That decision calls out for review primarily because it flatly conflicts with decisions from three other circuits that have affirmed awards of fees to defendants who had prevailed based on the EEOC's failure to satisfy its pre-suit obligations. That conflict reflects a broader disagreement among the circuits about whether and when fees may be awarded to defendants in civil rights cases terminated prior to a ruling on the merits. In addition, the decision is difficult to square with this Court's decisions in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Finally, the Eighth Circuit's ruling makes no sense as a matter of statutory policy.

1. On September 27, 2007, the EEOC filed a complaint on behalf of Monika Starke, a CRST driver, and a class of "similarly situated" but unidentified CRST female employees. Pet. App. 34a. EEOC sought injunctive relief and compensatory and punitive damages for Ms. Starke and other unidentified CRST female employees who had allegedly been sexually harassed while employed by CRST as long-distance

truck drivers or trainees. *Id.* at 36a. After filing its complaint, the EEOC sought to establish that CRST had engaged in a pattern or practice of tolerating such harassment.

During pretrial discovery, the EEOC began identifying the individuals on whose behalf it was asserting individual claims of sexual harassment. Because CRST was confronted with an ever-growing number of individual claims to defend against as the close of discovery and the trial date approached, it sought relief from the district court, and the court imposed a deadline for the EEOC's identification of its individual claims. As the deadline approached, the EEOC began identifying large numbers of claims and ultimately named 270 women whom it alleged had been sexually harassed by male CRST drivers. Pet. App. 38a.

CRST moved for an order to show cause why these hastily identified claims should not be dismissed on the ground that the EEOC had identified so many claims in such a short period of time that it clearly had not adequately determined that the claims were valid. In response, the EEOC represented to the district court that it had sufficient grounds for all 270 claims. The district court accepted that representation, but warned the EEOC that if it turned out that its claims were not reasonably grounded, CRST could seek compensation. Pet. App. 39a.

As the extensive discovery came to a close — CRST ultimately deposed 154 of the EEOC's individual claimants — it became clear that EEOC did not have valid grounds for the vast majority of its claims. For a

start, 99 of the EEOC's 270 individual claims were dismissed by the district court as a discovery sanction, which the EEOC did not appeal, because the claimants did not even appear for their depositions. Pet. App. 40a. The EEOC unilaterally dropped 18 other claims.

The district court next granted summary judgment to CRST on the pattern or practice issue.[1] The district court concluded, on undisputed facts, that CRST's written anti-harassment policy and its enforcement of that policy satisfied Title VII's requirements. In addition, the district court found that the incidence of allegations of sexual harassment at CRST was too low to suggest any wrongful pattern or practice. EEOC did not appeal these summary judgment rulings.

The district court also granted summary judgment to CRST on 87 of the EEOC's remaining 154 individual claims. The grounds for these rulings, which varied from claim to claim, included that the alleged harassment was not severe or pervasive, that the female drivers had not complained of harassment while on the alleged harassers' trucks, that CRST had adequately responded when it received timely harassment complaints by promptly removing the female drivers from the alleged harassers' trucks, and that some claims were untimely.[2]

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[1] *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918 (N.D. Iowa 2009).

[2] The district court's summary judgment rulings on individual claims are available at *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867 (N.D. Iowa 2009) (statute of limitations); *EEOC v. CRST Van Expedited, Inc.*, 614 F. Supp. 2d 968 (N.D. Iowa 2009)

2. Once the district court held that EEOC did not have even a prima facie case that CRST had engaged in a pattern or practice of tolerating sexual harassment of its female drivers, it was clear that, except for its claims on behalf of Monika Starke and Remcey Peeples,[3] the EEOC had not fulfilled its statutory requirement to investigate the individual claims, find reasonable cause for those claims, and then attempt to conciliate them before bringing suit. Because CRST does not operate a large common workplace, such as a factory, each of the other 152 individual claims was based on different and unique facts — different female drivers, alleged harassers, trucks, locations, and nature of the alleged harassment — that had not been investigated by the EEOC before filing this suit. Therefore, CRST filed a motion to dismiss the remaining 67 individual claims, which the district court

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(judicial estoppel); *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 46204 (N.D. Iowa June 2, 2009) (intervenors' claims); *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 52089 (N.D. Iowa June 18, 2009) (failure to report or effective CRST response to reported harassment); *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, Order (N.D. Iowa July 6, 2009), ECF No. 256 (alleged harassment not severe or pervasive); *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 64118 (N.D. Iowa July 9, 2009) (two or more grounds).

[3] Ms. Peeples had filed a charge with the EEOC which investigated it, found reasonable cause, and attempted to conciliate it. The EEOC then included her claim in its lawsuit. Ms. Peeples subsequently asserted her own claim as an intervenor, but the district court granted summary judgment to CRST and the Eighth Circuit affirmed. Pet. App. 152a-154a. CRST has not sought to recover its fees with respect to the EEOC's claims on behalf of Ms. Peeples or Ms. Starke.

granted after holding an evidentiary hearing. Pet. App. 202a-215a.

In response to CRST's motion to dismiss, the EEOC conceded that it had not separately investigated, found reasonable cause, or attempted to conciliate any of its individual claims other than those on behalf of Ms. Starke and Ms. Peeples. However, the EEOC argued that, because it satisfied the Title VII pre-suit requirements for at least one sexual harassment claim, here the Starke claim, it was not required to do so for other female drivers' sexual harassment claims against the same employer. The district court rejected that argument:

> The EEOC cites no binding legal authority that allows it to do what it is attempting to do in this case, *i.e.*, bootstrap the investigation, determination and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons. The mere fact that Starke and a handful of other women allege they were sexually harassed while working for CRST provides no basis for the EEOC to litigate the allegations of 67 other women in this lawsuit.

Pet. App. 206a.

Based on the record, the district court found that the

> "EEOC did not conduct any investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint — let alone issue a reasonable cause determination as to those allegations or conciliate them. The record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case."

Pet. App. 204a.

Finding that CRST's request for an award of its fees and costs met the *Christiansburg* standard for fees awards to defendants ("frivolous, unreasonable, or without foundation"), the district court awarded CRST $4,004,371.65 in attorney's fees and $463,071.25 in expenses in addition to taxable costs.[4]

3. The EEOC appealed the dismissal of the 67 claims for failure to satisfy Title VII's pre-suit requirements, as well as 40 of the district court's summary judgment rulings and the award of fees and costs. The Eighth Circuit affirmed as to all but two of the claims that EEOC included in its appeal. It affirmed as to 38 of the 40 claims on which summary judgment had been granted. Pet. App. 114a. It also affirmed the dismissal of the 67 claims that had been

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[4] The district court's first decision awarding fees and costs to CRST is available at *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010).

dismissed, agreeing that EEOC had "wholly failed" to satisfy Title VII's pre-suit requirements. Pet. App. 115a-116a. Because two claims were remanded to the district court and there was thus no final judgment in place, the Eighth Circuit vacated the district court's award of fees and costs to CRST without prejudice. Pet. App. 156a.

On remand, after entry of another final judgment, CRST renewed its petition for an award of attorney's fees and costs. The district court again found that the EEOC's pursuit of its claims was unreasonable under *Christiansburg* and awarded CRST $4,189,296.10 in attorney's fees, $413,387.58 in out-of-pocket expenses, and taxable costs of $91,758.46. Pet. App. 84a-85a.

4. On its second appeal, the EEOC did not contest the calculation of the fee award, but contended instead that, because of a settlement reached regarding Monica Starke, the EEOC was the prevailing party, not CRST. The EEOC argued alternatively that, if CRST was held to be the prevailing party, then it was not eligible for a fee award under the *Christiansburg* standard.

The Eighth Circuit rejected the EEOC's contention that it was the prevailing party. Pet. App. 17a-18a. However, the Court of Appeals vacated the district court's fee award with respect to the 84 individual claims dismissed on summary judgment and remanded the fee issue for a determination by the district court whether each individual claim was unreasonable under *Christiansburg*. *Id.* at 28a. The Eighth Circuit reversed the fee award with respect to the claims dismissed because of the EEOC's failure to satisfy Title VII's pre-suit requirements. It held that those

requirements were "prerequisite[s] to initiating a lawsuit" under *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 165-66 (2010), and not elements or ingredients of the EEOC's Title VII cause of action under *Arbaugh*. Pet. App. 21a. Therefore, under Eighth Circuit law, the unreasonableness of the EEOC's conduct could not be a basis for a fee award.

CRST petitioned for rehearing *en banc* which was denied on February 20, 2015. Pet App. 218a.

REASONS FOR GRANTING THE WRIT

As this Court recently recognized, before the EEOC can bring suit under Title VII, it "must try to remedy unlawful workplace practices through informal methods of conciliation." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015). After a complainant files a charge with the Commission, the EEOC must undertake an investigation. If it finds reasonable cause to believe the allegation has merit, it must then attempt to resolve the matter through informal and confidential conciliation. *Id.* Only if that process has been tried and failed may the Commission bring suit. *Id.* This requirement is central to the operation of the statutory scheme, and it is enforceable by courts. *Id.* at 1655-56.

As already noted, Title VII also provides for awards of attorney's fees and costs to prevailing parties, including to prevailing defendants if they can show that the plaintiff's case was unreasonable or frivolous within the meaning of *Christiansburg*. The question presented here is whether such fee awards are available where a claim is dismissed based on the

EEOC's total failure to comply with its pre-suit obligations or whether, as the Eighth Circuit held, fees are precluded in that situation because the victory was not sufficiently "on the merits."

That question warrants review because the Eighth Circuit's rule conflicts with the rule applied in at least three other circuits. Moreover, under this Court's decisions in *Christiansburg* and *Arbaugh*, there is good reason to treat the EEOC's failure to comply with pre-suit obligations — at least where it is sufficiently serious to require dismissal of a claim — as a failure to satisfy an element of the EEOC's case. Finally, there is no apparent statutory policy supporting a rule that allows fee awards when the EEOC brings a frivolous case but not when it flatly fails to fulfill a prerequisite to suit like investigation of the claim or conciliation.

In *Mach Mining*, the Court very recently addressed Title VII's conciliation requirement. Resolving a Circuit conflict, the Court held that the EEOC's conciliation obligations are enforceable by the defendant but subject only to "relatively barebones review." 135 S. Ct. at 1652. The Court went on to say that where a district court finds a failure to comply with conciliation obligations, the appropriate remedy is to stay the case and "order the EEOC to undertake the mandated efforts to obtain voluntary compliance." *Id.*

This case, however, involves much more than a failure to conciliate and consequently required a stronger remedy than granting a stay and giving the EEOC a second try. As described above, the EEOC failed altogether to investigate, find reasonable cause, or conciliate 152 individual claims before it litigated

them. When CRST moved for relief prior to deposition discovery from the EEOC's fast-increasing number of individual claims, the EEOC assured the district court that each of its individual claims had sufficient factual and legal support. After more than 150 depositions, several summary judgment motions addressing the EEOC's individual claims, and the district court's finding that the EEOC did not have even a *prima facie* claim that CRST had engaged in a pattern or practice of tolerating sexual harassment, it became clear the EEOC had no evidence supporting most of its individual claims and had not satisfied Title VII's pre-suit requirements for any of the claims upon which the fee award is based. Finding that the EEOC had "wholly abdicated" its pre-suit obligations, the district court held that the only commensurate remedy at that point was dismissal.[5] The Eighth Circuit properly

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[5] Unlike a mere failure to conciliate, a failure by the EEOC to investigate and find reasonable cause will seldom, if ever, be curable by a stay. As in this case, the issue will only be uncovered long after the defendant has incurred substantial fees and costs. The district court explained why a dismissal was the appropriate remedy in this case:

> Here, dismissal is a severe but appropriate remedy. Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's "integrated, multistep enforcement procedure." *Occidental Life*, 432 U.S. at 355. It would ratify a "sue first, ask questions later" litigation strategy on the part of the EEOC, which would be anathema to Congressional intent. The court cannot ignore the law as it is written by Congress and construed by the

affirmed because it too found that "[t]he present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women, thus we cannot conclude that the district court abused its discretion in dismissing the EEOC's suit." Pet. App. 115a-116a.[6]

The question whether fees may be awarded against the EEOC in circumstances like those presented here thus remains a live and important issue.

I. The Eighth Circuit's Holding That CRST Is Not a Prevailing Party for Purposes of an Attorney's Fee Award Conflicts Directly with Decisions of the Fourth, Ninth, and Eleventh Circuits.

If this case had been litigated in the Fourth, Ninth, or Eleventh Circuits, the district court's award of fees and costs to CRST would have been affirmed. Each of

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Eighth Circuit Court of Appeals in *Delight Wholesale* [973 F.2d 664, 668 (8th Cir. 1992)].

Pet. App. 214a-215a (internal footnote omitted).

[6] Nor is this case an isolated instance in which the EEOC "sued first and asked questions later." In *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152-54 (4th Cir. 2014), for example, the Fourth Circuit affirmed the district court's fee award to the defendant employer because the EEOC had filed suit despite being unable to identify any victims of the alleged employment discrimination. *See also EEOC v. Global Horizons, Inc.*, No. CV-11-3045-EFS, 2015 U.S. Dist. LEXIS 37674, at *35 (E.D. Wash. Mar. 19, 2015) (finding that defendant employer is entitled to a fee award because the EEOC filed the lawsuit alleging employment discrimination and harassment based on national origin without first conducting "a reasonable and diligent investigation").

those Circuits has held that a dismissal of a case based on the EEOC's failure to satisfy Title VII's pre-suit requirements entitles the prevailing defendant to an attorney's fee award if the *Christiansburg* unreasonableness standard is met. *See EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152-54 (4th Cir. 2014); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982).

In *Propak*, the Fourth Circuit affirmed the district court's fee award to the defendant employer because the EEOC "acted unreasonably in initiating the litigation" without having identified potential individual claimants during its investigation. 746 F.3d at 152-54. Concurring, Judge Wilkinson explained why a fee award to a prevailing defendant is critically important in a case in which EEOC's investigation and reasonable cause determination did not justify the lawsuit the EEOC filed:

> The EEOC in particular brings suit against a wide range of employers for whom the defense of lawsuits may be prohibitively expensive. *Christiansburg* was sensitive to this problem, noting that "many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights."

Id. at 155 (Wilkinson, C.J., concurring), *quoting Christiansburg*, 434 U.S. at 423 n.20.

Similarly, in *Pierce Packing*, the Ninth Circuit held that a mere "exchange of letters between Pierce and the EEOC was inadequate to constitute legitimate conciliation," 669 F.2d at 608, and affirmed the district court's award of attorney's fees against the EEOC, *id.* at 609. It found support in the record for the district court's conclusion that the EEOC's "obvious disregard [of its conciliation obligations was] the apex of unreasonableness." *Id.* (quotation marks omitted). Finally, in *Asplundh*, the Eleventh Circuit agreed that the EEOC had not made a good faith effort to conciliate before suing and held that, "[u]nder these circumstances, the sanction of dismissal, awarding attorney's fees, is not an unreasonable remedy or an abuse of the district court's discretion." 340 F.3d at 1261.[7]

Here, however, the Eighth Circuit came to the opposite conclusion based on its rule that a dismissal of a case can be a basis for fees against the the EEOC only if it addresses the "merits" and that a dismissal based on its failure to satisfy its statutory pre-suit obligations does not count. There is thus a clear and direct circuit conflict.

Indeed, the conflict is even broader when one takes into account private suits litigated under Title VII as well as cases brought under 42 U.S.C. § 1983 in which

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[7] The Fifth Circuit has also agreed with these other three circuits in *dictum*. *See EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 469 (5th Cir. 2009) (dictum) ("The EEOC acts unreasonably in disregarding procedural requirements for suit, and attorney's fees may be awarded." (citing *Pierce Packing*, 669 F.2d at 609)).

fees may be awarded under 42 U.S.C. § 1988. In one such case, cited by the court below, Pet. App. 18a, the Eighth Circuit followed its rule that non-merits-based victories cannot form the basis of defendant fee awards. *See Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994).[8] But a different rule has been applied in other circuits. *See D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013) (fee award allowed where case dismissed on abstention grounds); *Neroni v. Becker*, No. 13-3903, __F. App'x __, 2015 U.S. App. LEXIS 6789, at *1-2 (2d Cir. Apr. 22, 2015) (summary order) (same); *Anthony v. Marion Cnty. Gen. Hosp.*, 617 F.2d 1164, 1169-70 (5th Cir. 1980) (fees allowed after case dismissed for want of prosecution); *see also Elwood v. Drescher*, 456 F.3d 943, 948-49 (9th Cir. 2006) (fees are not allowed after jurisdictional or abstention-based dismissals but are allowed after a dismissal based on Eleventh Amendment immunity).

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[8] *Marquart* relied in part on *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990), which held that a fee award cannot be made by a court that has determined it lacks jurisdiction over the case. There is a conflict on that question as well. *See, e.g., Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 926-28 (7th Cir. 2000); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055-57 (10th Cir. 2004).

II. The Eighth Circuit's Holding That the EEOC's Failure to Satisfy Title VII's Pre-Suit Requirements Cannot Justify a Fee Award Is in Tension with *Arbaugh* and *Christiansburg*.

Even assuming that the Eighth Circuit was right to require a victory "on the merits" before a prevailing defendant can be awarded fees, this Court's decision in *Arbaugh* strongly suggests that this requirement was met here. In *Arbaugh*, the Court addressed the rule that Title VII applies only to employers with 15 or more employees. The question presented was whether that requirement "is 'jurisdictional' or relates to the 'merits' of a Title VII claim." 546 U.S. at 513. The Court held that numerosity is a non-jurisdictional element of the plaintiffs' case under Title VII. *Id.* at 515.

Arbaugh thus supports the proposition that the "merits" in a Title VII case extend beyond questions relating to whether illegal discrimination occurred and include at least one prerequisite to liability, numerosity. For that reason, the Eighth Circuit presumably would allow an award of fees where the EEOC brought a frivolous lawsuit that was dismissed solely on the ground that the defendant had too few employees to violate Title VII.

It would be logical to treat the issue of the EEOC's satisfaction of its statutory pre-suit duties in a similar fashion. Far from being a mere technicality, Title VII's pre-suit requirements are the very means by which EEOC defines the nature and scope of the claims it is

permitted to litigate. As the Eighth Circuit put it in the prior appeal in this case:

> [t]he permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or *developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

Pet. App. 109a (emphasis in original), *quoting EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668 (8th Cir. 1992).

Indeed, this Court in its recent *Mach Mining* decision emphasized that Title VII's "conciliation provision explicitly serves a substantive mission: to 'eliminate' unlawful discrimination from the workplace. 42 U.S.C. § 2000e–5(b)." *Mach Mining*, 135 S. Ct. at 1654. The same is equally true for Title VII's requirements that the EEOC investigate and find reasonable cause before filing suit.

The panel below ruled, however, that a complete failure to undertake the required Title VII pre-suit process was sufficiently different from a failure to satisfy *Arbaugh*'s numerosity requirement that it

cannot be a basis for a fee award. In so doing, it relied on this Court's decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). The issue there was whether the requirement that a copyright be registered before certain copyright claims may be litigated is jurisdictional. Applying *Arbaugh*, this Court said no. In reaching this conclusion, it drew a distinction between requirements that are elements of claims, as in *Arbaugh*, and a requirement that is a "prerequisite to initiating a lawsuit," such as copyright registration. *Id.* at 165-66. But it concluded that this distinction made no difference because both could be non-jurisdictional.

The panel in this case embraced this distinction and made it dispositive of CRST's eligibility for fees, even though *Reed Elsevier* obviously was not addressing anything about attorney's fees. But the panel never explained why it would make sense to draw a line, for fee purposes, between dismissals based on numerosity and dismissals based on failure to investigate, find reasonable cause and conciliate as Title VII also requires. It simply construed the Eighth Circuit's "merits only" rule very strictly and used *Reed Elsevier* as a readily available explanation of why it was drawing an otherwise seemingly irrational line.

Like *Arbaugh*, *Christiansburg* itself strongly suggests that the Eighth Circuit has gone astray in applying a rule precluding fees where a defendant prevails by demonstrating the EEOC's unreasonable failure to investigate, find reasonable cause, and conciliate before filing suit. That is because

Christiansburg itself involved a barrier to suit far afield from the merits of any discrimination suit.

In *Christiansburg*, the EEOC had notified the charging party in that case that its conciliation efforts had failed and that she had a right to sue the employer in federal court, but she did not do so. In 1972, approximately two years after the EEOC had sent that right-to-sue letter and terminated the administrative proceeding, Congress amended Title VII by authorizing the EEOC to sue in its own name and also permitted such suits with respect to any "charges pending with the Commission" on the effective date of the amending legislation. 434 U.S. at 414 (quotation marks omitted). The EEOC tried to use this authorization to bring suit on behalf of the charging party. The district court dismissed the EEOC's action because the charge had not been pending on the relevant date. *Id.* The defendant then requested an award of its attorney's fees, but the district court held that such an award was not justified. The court of appeals affirmed, with one judge dissenting.

This Court, after defining the standard for fee awards to prevailing defendants, affirmed the denial of fees to the defendant because the district court had applied the correct legal principles and had not abused its discretion. This Court specifically noted the district court's holding that the statutory interpretation upon which the EEOC's case was dismissed was an issue of first impression and that "the Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous." *Id.* at 423-24 (internal quotation marks omitted).

But, significantly, the Court did not hold or even suggest that the defendant was ineligible for a fee award because the ground for dismissal was lack of standing, not the EEOC's failure to establish substantive elements of its Title VII cause of action. Thus, at least by negative implication, *Christiansburg* supports the proposition that what matters for fee purposes is the reasonableness of the plaintiff's actions, not whether the dismissal satisfied some arbitrary requirement of being "on the merits."

III. The Eighth Circuit Rule Makes Little Sense.

Putting aside the glaring conflicts with other circuits and the tension with this Court's own rulings, the decision below is utterly inexplicable as a matter of statutory policy. Congress enacted Title VII's pre-suit requirements to prevent the EEOC from causing unjustified costs and disruption to an employer by filing unfounded or unduly broad claims and not attempting in good faith to settle such claims before litigating them. Awarding attorney's fees to the prevailing defendant based upon the EEOC's unreasonable failure to satisfy Title VII's pre-suit requirements is essential to enforcing those statutory requirements.

When Congress in 1972 authorized the EEOC for the first time to enforce Title VII through litigation in its own name rather than through the Department of Justice, Congress enacted Title VII's pre-suit requirements as a limitation on the EEOC's authority to sue. As the legislative history of the 1972 legislation demonstrates, Congress imposed the pre-suit requirements to avoid the disruption and cost to the

defendant employer of unfounded or unreasonably expansive lawsuits:

> The Commission wants to pursue through discovery those issues which it chose not to pursue in conciliation. This approach leads to the abuse of discovery. Congress maintained the provisions for conciliation and voluntary compliance when it passed the 1972 Amendments in order to prevent interminable litigation which would be a burden on both the EEOC and the district courts, not to mention the entities which are sued. *See EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974).

EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977) (footnote omitted).

As both lower courts found, this case presents a flagrant violation of those statutory protections by the EEOC. The district court, after rejecting EEOC's pattern or practice allegation and making more than 100 individual summary judgment decisions, found that the EEOC had "wholly abandoned" its statutory pre-suit obligations. Pet. App. 204a. The Eighth Circuit similarly found that "[t]he present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women . . . ." Pet. App. 115a-116a. Yet the Eighth Circuit reversed the fee award compensating CRST for some measure of the litigation cost it incurred that was caused by the EEOC's dereliction of its statutory duty.

Appendix A

United States Court of Appeals
Eighth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Plaintiff–Appellant

v.

CRST VAN EXPEDITED, INC. Defendant–Appellee.

No. 13–3159.
Submitted: Sept. 11, 2014.
Filed: Dec. 22, 2014.
Rehearing and Rehearing En Banc Denied Feb. 20, 2015

Before RILEY, Chief Judge, SMITH and KELLY, Circuit Judges.

SMITH, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) appeals the district court's award of $4,694,442.14 in attorneys' fees, expenses, and costs to CRST Van Expedited, Inc. (CRST) following the parties' $50,000 settlement of the only remaining claim, out of 154 individual claims, against CRST. For the reasons discussed *infra*, we reverse and remand for further proceedings consistent with this opinion.

I. Background

A more extensive factual background of this case is available in our prior opinion. *See EEOC v. CRST Van*

Expedited, Inc., 679 F.3d 657 (8th Cir. 2012) ("*CRST IV*"). We will provide only an abbreviated procedural history to provide context for the present dispute.

A. Underlying Action

"The ... EEOC ... filed suit in its own name against CRST ..., alleging that CRST subjected Monika Starke 'and approximately 270 similarly situated female employees' to a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 ('Title VII'), 42 U.S.C. § 2000e *et seq.*" *Id.* at 664. Specifically, "[t]he EEOC alleged that CRST was responsible for severe and pervasive sexual harassment in its New–Driver Training Program ('Training Program')." *Id.* at 665.

Thereafter, the district "court granted Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Starke and Latetsha Thomas's request to intervene." *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2013 WL 3984478, at *4 n.5 (N.D. Iowa Aug. 1, 2013) ("*CRST III*").

For approximately two years after the filing of the suit, the EEOC failed to identify the women comprising the putative class; as a result, the district court ordered the EEOC "to (1) immediately amend its list of 270 women as soon as it learned of any women whose claims it no longer wished to pursue and (2) make all women on whose behalf it sought relief available to CRST for deposition." *CRST IV*, 679 F.3d at 670 (citation omitted). The penalty for failing to present a particular woman for deposition before the conclusion of discovery "would result in a 'discovery sanction' forbidding that woman from testifying at trial and

barring the EEOC from seeking relief on her behalf in the case." *Id.* (citation omitted). "Although the EEOC complied with the court's directive and filed updated and corrected lists of allegedly aggrieved individuals, it failed to make all of the identified individuals available for deposition before [the deadline]." *CRST III*, 2013 WL 3984478, at *3. The district court then enforced its prior order and "barred the EEOC from pursuing relief for any individual not made available for deposition before the deadline." *Id.* Thereafter, "the EEOC filed an Updated List of Class Members, which listed 155 allegedly aggrieved individuals for whom the EEOC was still pursuing relief and 99 individuals who the EEOC alleged were sexually harassed but for whom the EEOC was not pursuing relief based on the court's ... [o]rder." *Id.* (footnote omitted).

In a series of orders, the district court ruled on CRST's various motions for summary judgment. First, CRST moved for summary judgment on the EEOC's purported pattern-or-practice claim. The district court found the motion "odd" because no "pattern[-]or[-]practice claim" appeared in the EEOC's complaint. "'[T]he EEOC did *not* allege that CRST was engaged in 'a pattern or practice of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e–6.'" *CRST IV*, 679 F.3d at 676 n.13 (quoting *EEOC v. CRST Van Expedited, Inc.* ("*CRST II*"), No. 07–CV–95–LRR, 2009 WL 2524402, at *7 n.14 (N.D. Iowa Aug. 13, 2009)).

> The district court had "*assumed* [that] the EEOC had the right to maintain a pattern-or-practice claim in this case but

> dismissed it with prejudice. The court held as a matter of law that there was insufficient evidence from which a reasonable jury could find that it was CRST's 'standard operating procedure' to tolerate sexual harassment."[1]

Id. (alteration in original) (emphasis added) (quoting *CRST II*, 2009 WL 2524402, at *7 n.14); *see also CRST III*, 2013 WL 3984478, at *3 ("Specifically, the court held that, to the extent the EEOC asserted a pattern [-]or[-]practice claim, such claim was dismissed with prejudice and, consequently, CRST was liable only to the extent the EEOC could prove individual claims of sexual harassment."). In *CRST IV*, "[w]e, like the district court, 'express[ed] no view as to whether the EEOC's investigation, determination and conciliation of Starke's Charge would be sufficient to support a *pattern [-]or-practice* lawsuit.' "679 F.3d at 676 n.13 (quoting *CRST II*, 2009 WL 2524402, at *16 n.21).

Second, CRST moved for summary judgment based on the statute of limitations and other grounds; the district court "found that the applicable statute of limitations barred the EEOC from seeking relief on behalf of 9 individuals and barred, in part, the EEOC from seeking relief on behalf of another 3 individuals." *CRST III*, 2013 WL 3984478, at *3 (citation omitted).

Third, "the district court granted CRST summary judgment against three women, including Starke,

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[1]In its April 30, 2009 order, the district court stated, "In other words, the court assumes without deciding that this is a sexual harassment pattern[-]or[-]practice case."

reasoning that the women were judicially estopped from prosecuting their claims." *CRST IV*, 679 F.3d at 670 (footnote omitted) (citing *EEOC v. CRST Van Expedited, Inc.* ("*CRST I*"), 614 F. Supp. 2d 968 (N.D. Iowa 2009)).

Fourth, CRST moved for summary judgment against certain interveners' claims, and the district court granted in part and denied in part the motion. *CRST III*, 2013 WL 3984478, at *4. The court concluded that Boot's claims were frivolous or, in the alternative, that she did not generate a genuine issue of material fact regarding CRST's knowledge of the purported harassment and CRST's alleged failure to take proper remedial action. *Id.* Additionally, the court dismissed Peeples's claims and Nicole Cinquemano's claims, concluding that CRST lacked actual or constructive knowledge of the alleged harassment. *Id.* "The court further held that the EEOC was barred from seeking relief at trial to the same extent these Plaintiffs–Interveners were barred." *Id.* (citation omitted).

Fifth, CRST moved for summary judgment based on the class members' failure to report the alleged harassment or CRST's prompt and effective response to the reported harassment. *Id.* The district court granted the motion in part and denied it in part, finding "that the EEOC was barred from seeking relief on behalf of [(1)] 11 individuals because CRST did not know or have reason to know that they were sexually harassed and [(2)] 4 individuals because CRST adequately addressed the sexual harassment." *Id.*

Sixth, CRST moved for summary judgment against class members who did not experience severe or pervasive sexual harassment, and the court granted the motion in part and denied it in part, concluding "that the EEOC had failed to generate a genuine issue of material fact as to whether 11 individuals had experienced severe or pervasive sexual harassment and, consequently, held that the EEOC was barred from seeking relief on their behalf." *Id.*

Seventh, CRST moved for summary judgment against class members whose claims purportedly failed on two or more grounds, and the court granted the motion in part and denied it in part. *Id.* The court prohibited the EEOC from seeking relief on behalf of 46 women. *Id.* The EEOC conceded that "4 individuals did not suffer actionable sexual harassment," and the court

> found that a reasonable jury could not find 42 individuals suffered from actionable sexual harassment because they did not suffer severe or pervasive sexual harassment and/or there was insufficient evidence to show that CRST knew or should have known that the individuals suffered sexual harassment yet failed to take proper remedial action.

Id.

"Finally, ... the district court barred the EEOC from seeking relief for the remaining 67 women after concluding that the EEOC had failed to conduct a reasonable investigation and *bona fide* conciliation of these claims—statutory conditions precedent to

instituting suit." *CRST IV*, 679 F.3d at 671 (citing *CRST II*, 2009 WL 2524402). The district court dismissed the EEOC's complaint because it had "disposed of all the allegedly aggrieved women in the EEOC's putative 'class.'" *Id.*

After the district court dismissed the action, CRST filed a bill of costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920 and moved for attorneys' fees pursuant to 42 U.S.C. § 2000e–5(k). The district "court awarded CRST $92,842.21 in costs, $4,004,371.65 in attorneys' fees[,] and $463,071.25 in out-of-pocket expenses, for a total of $4,560,285.11." *CRST III*, 2013 WL 3984478, at *5 (citations omitted).

B. Appeal

"[T]he EEOC appeal[ed] the district court's dismissal of its claims as to 107 women." *CRST IV*, 679 F.3d at 670. On appeal, the EEOC argued that the district court (1) erroneously barred it "from pursuing claims as to 67 women based on its failure to reasonably investigate or good-faith conciliate," *id.* at 671; (2) erroneously granted summary judgment on Starke's, Payne's, and Timmons's individual claims, as well as on the EEOC's claims on their behalf, based on judicial estoppel, *id.* at 677; (3) erroneously granted summary judgment on the merits of several of its hostile work-environment claims against CRST, *id.* at 682–86; and (4) abused its discretion in awarding CRST attorneys' fees and expenses, *id.* at 694.

After analyzing each of the EEOC's contentions,

> we affirm[ed] in part, reverse[d] in part, and remand[ed] for further proceedings consistent

> with this opinion. Specifically, we reverse[d] the district court's grant of summary judgment on the EEOC's claims as to Monika Starke because the EEOC, suing as a plaintiff in its own name under § 706, may not be judicially estopped because of Starke's independent conduct. Additionally, we reverse[d] the district court's grant of summary judgment on the EEOC's claims on behalf of Tillie Jones because the EEOC ... produced sufficient evidence to create a genuine fact issue as to the severity or pervasiveness of harassment that she allegedly suffered. Finally, we vacate [d], without prejudice, the district court's award of attorneys' fees to CRST because, in light of these aforementioned rulings, CRST [wa]s no longer a "prevailing" defendant under 42 U.S.C. § 2000e–5(k). We affirm[ed] the remainder of the district court's orders and remand[ed] for further proceedings consistent with th[e] opinion.

CRST IV, 679 F.3d at 695 (footnote omitted).

C. Remand

On remand, the EEOC withdrew its claim on behalf of Jones, explaining that "the law of the case, specifically this Court's order of August 13, 2009 ..., bars its claim on behalf of Tillie Jones." The referenced order was the one in which the district court barred the EEOC from seeking relief on behalf of some claimants for the EEOC's failure to fulfill the statutory conditions precedent to instituting suit, i.e., a reasonable investigation and *bona fide* conciliation.

Subsequently, CRST and the EEOC settled the case and jointly moved for an order of dismissal. The Settlement Agreement that the parties entered provided that CRST would pay $50,000 in settlement of the EEOC's claim on behalf of Starke. It further provided:

> 4. This Agreement does not preclude CRST from pursuing attorney[s'] fees and costs pursuant to the Order of the Eighth Circuit dated May 8, 2012.
>
> 5. Further, this Agreement does not preclude either [the] EEOC or CRST from making any arguments relating to CRST's pursuit of attorney[s'] fees and costs, including arguments relating to whether [the] EEOC or CRST is the prevailing party.

The district court granted the motion to dismiss, and CRST then filed a bill of costs and moved for an award of attorneys' fees. The EEOC resisted the bill of costs and motion for attorneys' fees. First, it argued that its "case was comprised of a single claim and that it won that claim." *CRST III*, 2013 WL 3984478, at *9. The district court found this argument meritless, concluding that "on the face of the Complaint, it is clear that the EEOC sought relief on behalf of at least two individuals and, thus, there were at least two claims," i.e., Starke's claim and at least one class member's claim. *Id.* Ultimately, the court found "that the EEOC asserted multiple and distinct claims against CRST" and that CRST only lost on one of those claims—Starke's claim. *Id.* at *10. Applying Supreme Court precedent, the court reasoned that "CRST need

not prevail on every claim to be entitled to an award of attorneys' fees"; therefore, it "consider[ed] whether there was a judicial determination on the merits in favor of CRST on each claim other than the claim on behalf of Starke." *Id.* (citing *Fox v. Vice*, —— U.S. ——, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011)).

Second, the EEOC argued that CRST was not a prevailing defendant because "'a large portion of the claim was not determined on the merits.'" *Id.* (citation omitted). The EEOC conceded "that 'CRST defeated the claim on the merits for 83 women for whom it was granted summary judgment.'" *Id.* (citation omitted). But it "argue[d] that 'CRST won on reasons other than the merits as to [98] of the women who were never deposed, and as to 67 women for whom ... [the] EEOC failed to meet the statutory prerequisites for suit.'" *Id.* (alterations in original) (citation omitted). The court rejected the EEOC's argument.

As an initial matter, it found that CRST was the prevailing party as to the EEOC's pattern-or-practice claim despite the EEOC's argument that it never asserted a pattern-or-practice claim in its complaint. The court reasoned "that CRST justifiably filed a motion for summary judgment on the pattern-or-practice claim given the confusion the EEOC created as to whether it was pursuing such a claim" and that the court subsequently granted CRST's motion for summary judgment on the merits of that claim. *Id.* (citation omitted).

The court then observed that after the dismissal of the purported pattern-or-practice claim, "there were 154 allegedly aggrieved individuals remaining and,

thus, CRST was required to defend against 154 sexual harassment claims." *Id.* (footnote omitted). The court rejected the EEOC's contention that "the court's dismissal of claims due to the EEOC's failure to satisfy the Title VII administrative prerequisites is not a judicial determination on the merits." *Id.* The court found that the EEOC's obligation to pursue administrative resolution is "an ingredient of the EEOC's claim" as opposed to a "jurisdictional prerequisite"; therefore, the court concluded that its "dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations is a dismissal on the merits of the EEOC's claims." *Id.*

The court also found that CRST was a prevailing party as to Jones's claim because, although the EEOC voluntarily dismissed the claim on remand, "had the EEOC not withdrawn its claim on behalf of Jones, the court would have dismissed it pursuant to its August 13, 2009 Order." *Id.* at *11.

Having determined that "CRST is the prevailing party on the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims," the court then "consider[ed] whether those claims on which CRST prevailed are frivolous, unreasonable or groundless." *Id.*

The district court *did not* individually analyze whether each of the 153 claims and purported pattern-or-practice claim were frivolous, unreasonable, or groundless. Instead, in summary fashion, it found that all the claims satisfied this standard.

As to attorneys' fees, expenses, and costs, the court concluded that CRST was entitled to $3,724,065.63 in attorneys' fees incurred pre-appeal. *Id.* at *18.

The court also awarded CRST "the reasonable amount of attorneys' fees incurred during the appeal proceedings" in the amount of $465,230.47. *Id.* at *18–19. The court justified its award as follows:

> Specifically, the court has already found that CRST is the prevailing party and that the *Christiansburg* [2] standard is satisfied as to all of the claims that the EEOC appealed, other than the claim on behalf of Starke. Moreover, the court finds that CRST provided sufficient documentation and, as discussed above, the court finds that $465,230.47 reflects the total appellate fees that CRST would not have incurred but for the EEOC's unreasonable or groundless claims.

Id. at *19.

Thus, the district court awarded $4,189,296.10 in attorneys' fees. *Id.* at *21. And, the court awarded $413,387.58 in out-of-pocket expenses to CRST. *Id.* Finally, the court also awarded CRST $91,758.46 in costs. *Id.*

In total, the court found that CRST was entitled to $4,694,442.14 for attorneys' fees, expenses, and costs. *Id.*

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[2] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978).

II. Discussion

On appeal, the EEOC argues that the district court erred in awarding $4,694,442.14 for attorneys' fees, expenses, and costs to CRST. First, the EEOC argues that the district court erred in finding that CRST was the prevailing party because it "erroneously viewed [the] EEOC's case as 154 separate claims and thought CRST deserved fees for its success on 153 of them." The EEOC maintains that it "had only one claim—that CRST violated Title VII by failing to prevent and remedy sexual harassment of its female trainees and drivers—and EEOC's settlement obtaining relief for one claimant was sufficient to render [the] EEOC the prevailing party." Second, the EEOC argues that the district court erroneously concluded that its dismissal of the "EEOC's claim based on deficiencies in its presuit processing constituted a ruling on the merits of [the] EEOC's claim." According to the EEOC, a dismissal based on failure to satisfy presuit obligations does not equate to a merits-based decision necessary for the court to find CRST to be a prevailing party. Third, the EEOC asserts that even if this court agrees with the district court that CRST is a prevailing party, "the district court erred in awarding fees to CRST because [the] EEOC's claim and conduct of this litigation were not frivolous, groundless, or unreasonable." Finally, the EEOC contends that the district court erred in awarding CRST appellate fees because the "EEOC's decision to appeal the initial dismissal of its case was reasonable, grounded in sound legal precedent, and supported by a reasonable hope of

reversal on appeal." We consider each of these arguments in turn.

Whether a party is a "prevailing party" is a question of law that we review de novo. *DocMagic, Inc. v. Mortgage P'ship of Am., L.L.C.*, 729 F.3d 808, 812 (8th Cir. 2013). "We review for an abuse of discretion the district court's actual award of fees and costs." *Id.*

"It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg*, 434 U.S. at 415, 98 S. Ct. 694 (citation omitted). "But Congress has authorized courts to deviate from this background rule in certain types of cases by shifting fees from one party to another." *Fox*, 131 S. Ct. at 2213 (citing *Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (listing federal fee-shifting provisions)). Like 42 U.S.C. § 1988, 42 U.S.C. § 2000e–5(k) is one of those "fee-shifting" provisions. *Burlington*, 505 U.S. at 562, 112 S. Ct. 2638. "The standards for assessing claims for attorney's fees pursuant to section 1988 and under the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(k), are identical." *Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 158 n.6 (3d Cir. 2001) (citations omitted). As a result, "cases used to interpret one statute may be used to interpret the other." *Id.* (citations omitted).

Just as § 1988 "allows the award of 'a reasonable attorney's fee' to 'the prevailing party,'" *Fox*, 131 S. Ct. at 2213, so too does § 2000e–5(k). 42 U.S.C. § 2000e–5(k) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."). Section 2000e–5(k) "authoriz[es] the award of attorney's fees to either plaintiffs *or defendants*, and entrust[s] the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg*, 434 U.S. at 416, 98 S. Ct. 694 (emphasis added) (footnote omitted).

With this legal framework in mind, we now address each of the EEOC's arguments in favor of reversal.

1. Single v. Multiple Claims

First, the EEOC argues that CRST cannot be a prevailing party because the EEOC brought only one "claim" against CRST—that CRST violated Title VII by failing to prevent an remedy sexual harassment of its female trainees and drivers—and CRST did not prevail on this claim, as evidenced by the EEOC obtaining a $50,000 settlement on Starke's behalf.[3]

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[3] The EEOC argues at length that it is a "prevailing party" plaintiff because it obtained the $50,000 settlement on Starke's behalf. We need not address whether the EEOC is a "prevailing plaintiff" and instead focus on whether CRST is a "prevailing defendant" because, as the district court explained, the EEOC "is not entitled to a fee award under 42 U.S.C. § 2000e–5(k)." *CRST*

Our task is to determine (1) how many claims the EEOC alleged in its complaint and (2) what types of claims it alleged.

"Section 706 of Title VII authorizes the EEOC to bring claims involving the rights of aggrieved individuals challenging an unlawful employment practice on an individual or class-wide basis[.]" *U.S. EEOC v. Global Horizons, Inc.*, 860 F. Supp. 2d 1172, 1191 (D. Haw. 2012) (citations omitted). The EEOC may "seek class action-type relief without complying with ... Federal Rule of Civil Procedure 23." *Id.* (quotation and citations omitted).

Here, the EEOC brought suit under Title VII "to correct unlawful employment practices on the basis of sex, and to provide appropriate relief to Monika Starke *and* a class of similarly situated female employees of defendant CRST." (Emphasis added.) The "Statement of Claims" provides that "two of [CRST's] lead drivers subjected Starke to sexual harassment during their supervision of Starke" and that "[o]ther similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST."

III, 2013 WL 3984478, at *10 n.7 (citation omitted). This is because § 2000e–5(k) permits fees to prevailing parties "other than the Commission or the United States." "Thus, it is of no consequence whether the EEOC qualifies as a prevailing party." *CRST III*, 2013 WL 3984478, at *10 n.7.

We agree with the district court that the EEOC alleged more than one claim. As the court explained, although the EEOC did not specify "how many individuals the EEOC was pursuing relief on behalf of until the litigation was well under way," "the face of the Complaint" shows that "the EEOC sought relief on behalf of at least two individuals and, thus, there were at least two [sexual-harassment] claims. By October 15, 2008, it became clear that the EEOC was asserting approximately 270 claims, although that number dropped to 255 by May 12, 2009." *CRST III*, 2013 WL 3984478, at *9. Furthermore, the EEOC's argument that it asserted only one claim against CRST in its complaint is undermined by our prior opinion. Throughout the opinion, we referred to the EEOC's "claims." *CRST IV*, 679 F.3d at 670–74, 682–83, 685, 688, 689–90, 694–95. We disagree with the EEOC's assertion that we used the term "claims" in the "non-technical sense." For example, we explained that "our de novo review of the EEOC's *claims concerning each woman* confirms the district court's conclusion that no fact issue remained" as to each woman's sexual-harassment claim. *Id.* at 690 (emphasis added). Therefore, we agree with the district court "that this case contained multiple and distinct claims for relief." *CRST III*, 2013 WL 3984478, at *9.

As to what types of claims the EEOC's complaint alleges, we reiterate our prior observation in the first appeal that "'the EEOC did *not* allege that CRST was engaged in 'a pattern or practice' of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e–6.'" *CRST IV*, 679

F.3d at 676 n.13 (quoting *CRST II*, 2009 WL 2524402, at *7 n.14). The district court merely *assumed without deciding* that the EEOC brought a pattern-or-practice claim and dismissed it with prejudice. *Id.* But the face of the complaint alleges no pattern-or-practice claim; therefore, it "seeks only to vindicate the rights of the individuals under Section 706." *U.S. EEOC v. Pioneer Hotel, Inc.*, No. 2:11–CV–1588–LRH–RJJ, 2013 WL 129390, at *4 (D. Nev. Jan. 9, 2013). Accordingly, to the extent that the district court's order awarded attorneys' fees to CRST based on a purported pattern-or-practice claim, we reverse.

In summary, we find that the EEOC's complaint alleged multiple sexual-harassment claims seeking to vindicate the rights of individuals.

2. Ruling on the Merits

The EEOC next argues that the district court's dismissal of 67 claims for the EEOC's failure to satisfy Title VII's presuit obligations does not constitute a ruling on the merits; therefore, the EEOC contends, CRST cannot be a prevailing party with respect to those claims.

"[P]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994) (citation omitted). "At the very least, this means that the [defendant] must have made a motion for summary judgment on the merits," as opposed to, for example, moving for dismissal for lack of subject

matter jurisdiction, on res judicata grounds, or on statute-of-limitations grounds. *Id.* (citations omitted) (holding that defendant was not a prevailing party for award of attorney fees in Title VII action where plaintiff took voluntary dismissal with prejudice before any summary judgment motion was made).

We previously set forth the EEOC's presuit obligations in *CRST IV*:

> First, an employee files with the EEOC a charge "alleging that an employer has engaged in an unlawful employment practice." [*Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359, 97 S. Ct. 2447, 53 L. Ed. 2d 402(1977)]. Second, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Id.* If reasonable cause does exist, the EEOC moves to the third step, which attempts to remedy the objectionable employment practice through the informal, nonjudicial means "'of conference, conciliation, and persuasion.'" *Id.* (quoting 42 U.S.C. § 2000e–5(b)). However, if unsuccessful, the EEOC may move to the fourth and final step and bring a civil action to redress the charge. *Id.* at 359–60, 97 S. Ct. 2447 (quoting 42 U.S.C. § 2000e–5(f)(1)).

679 F.3d at 672 (alteration in original).

The EEOC's ability to bring suit and the administrative process are "*sequential steps in a unified scheme* for securing compliance with Title VII." *Id.* (quotations and citations omitted).

Whether the district court's dismissal of several claims for failure of the EEOC to satisfy its Title VII presuit obligations constitutes a ruling on the merits depends on whether such presuit obligations constitute claim elements, as opposed to jurisdictional prerequisites or nonjurisdictional prerequisites to filing suit. In *Arbaugh v. Y & H Corp.*, the Supreme Court addressed "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." 546 U.S. 500, 503, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). Title VII requires "as a prerequisite to its application, the existence of a particular fact, *i.e.*, 15 or more employees." *Id.* at 513, 126 S. Ct. 1235. The Court observed that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516, 126 S. Ct. 1235. "Applying that readily administrable bright line to th[at] case, [the Court] h[e]ld that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Id.*

After *Arbaugh*, the Fifth Circuit "conclude[d] that the EEOC's conciliation requirement is a precondition to suit but not a jurisdictional prerequisite." *EEOC v. Agro Distrib., Inc.*, 555 F.3d 462, 469 (5th Cir. 2009). As a result, it held that the EEOC's failure to conciliate does not deprive a federal court of subject matter jurisdiction. *Id.* But the Fifth Circuit *did not* address whether conciliation is an element of the Title VII claim

or merely a nonjurisdictional prerequisite to filing suit. *See id.*

Thereafter, the Supreme Court again addressed the issue of prerequisites to filing suit in *Reed Elsevier, Inc. v. Muchnick*, holding that the Copyright Act's requirement that copyright holders register their works before suing for copyright infringement "is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." 559 U.S. 154, 157, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010). The Court reached this conclusion by comparing the numerosity requirement examined in *Arbaugh* to the Copyright Act's registration requirement and finding that neither were jurisdictional requirements. *Id.* at 161–66, 130 S. Ct. 1237. But the Court also noted a difference between the numerosity requirement at issue in *Arbaugh* and the registration requirement, stating, "That the numerosity requirement in *Arbaugh* could be considered an element of a Title VII claim, *rather than a prerequisite to initiating a lawsuit*, does not change this conclusion...." *Id.* at 165–66, 130 S. Ct. 1237 (emphasis added). According to the Court, "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Id.* at 166, 130 S. Ct. 1237 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)). The Court concluded that the registration requirement fit the "mold" of a nonjurisdictional prerequisite to filing suit because it "imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting

provision, and admits of congressionally authorized exceptions." *Id.* (citation omitted). As a result, the Court found that the registration requirement "imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents." *Id.*

Here, neither party argues that the EEOC's preconditions to filing suit are jurisdictional. *See Agro*, 555 F.3d at 469. Instead, the EEOC argues that its Title VII presuit obligations are nonjurisdictional preconditions, as in *Reed*, while CRST argues that such requirements are elements of the EEOC's cause of action, as in *Arbaugh*. If CRST is correct, then the district court's dismissal of claims for the EEOC's failure to satisfy its presuit obligations would constitute a ruling on the merits, as the EEOC would have failed to satisfy elements of the claims at issue.

Reed makes clear that a statutory condition, although not jurisdictional, may be a nonjurisdictional precondition to filing suit, as opposed to an element of the claim. *See id.* at 165–66, 130 S. Ct. 1237. We agree with the EEOC that its presuit obligations constitute nonjurisdictional preconditions that *are not* elements of the claim. The EEOC's Title VII presuit obligations set forth in 42 U.S.C. § 2005e–5(b) are more akin to the registration requirement in *Reed*. First, Title VII requires the EEOC to issue a reasonable cause finding and attempt conciliation before filing *any* lawsuit, not just a sexual-harassment lawsuit. *See* 42 U.S.C. § 2000e–5(b).

Second, we have never labeled such presuit obligations as "elements" of a Title VII sexual-harassment claim. Instead, as we explained in

CRST IV, a plaintiff asserting a Title VII claim must show

> (1) [that she belongs to] a protected group; (2) [that she suffered] unwelcome harassment; (3) [that there was] a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of [her] employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

679 F.3d at 685 (alterations in original) (quotations and citations omitted).

Finally, in contrast to the Title VII numerosity requirement at issue in *Arbaugh*, the EEOC's Title VII presuit obligations do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII. Instead, the EEOC's compliance with its presuit obligations provides employers an opportunity to resolve the dispute in lieu of litigation.

Because the EEOC's Title VII presuit obligations are not elements of the claim, the district court's dismissal of 67 claims for the EEOC's failure to satisfy Title VII's presuit obligations does not constitute a ruling on the merits. Therefore, CRST is not a prevailing party as to these claims, and it is not entitled

to an award of attorneys' fees on such claims. *See Marquart*, 26 F.3d at 852.[4]

3. Frivolous, Groundless, Unreasonable

Having determined that CRST may not recover attorneys' fees for (1) claims that the district court dismissed based on the EEOC's failure to satisfy its presuit obligations and (2) the purported pattern-or-practice claim, we next address whether CRST is entitled to an award of attorneys' fees based on "several of the district court's dispositive rulings concerning the merits of [the EEOC's] hostile work-environment claims against CRST." *CRST IV*, 679 F.3d at 682–83.

"In interpreting section 706(k) [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(k),] the Supreme Court has distinguished between prevailing Title VII plaintiffs and prevailing Title VII defendants." *Marquart*, 26 F.3d at 848. A district "court may award attorneys' fees to a prevailing Title VII plaintiff in all but very unusual circumstances." *Id.* (quotation and citation omitted). By contrast, a district "court may not award attorneys' fees to a prevailing Title VII defendant unless the 'court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" *Id.* (alteration in original) (quoting *Christiansburg*, 434 U.S. at 422, 98 S. Ct. 694).

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[4] For the same reason, CRST is not a prevailing party as to Jones's claim, which the EEOC voluntarily dismissed for its failure to satisfy its presuit obligations.

"In applying these criteria," the district court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421–22, 98 S. Ct. 694. "This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Id.* at 422, 98 S. Ct. 694. "[T]he course of litigation is rarely predictable," and "[d]ecisive facts may not emerge until discovery or trial." *Id.* Additionally, "[t]he law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* "Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* "So long as the plaintiff has some basis for the discrimination claim, a prevailing defendant may not recover attorneys' fees." *EEOC v. Kenneth Balk & Assocs.*, 813 F.2d 197, 198 (8th Cir. 1987) (quotation and citation omitted).

In summary, "a prevailing Title VII defendant is not entitled to attorneys' fees unless we determine that the plaintiff's claim was frivolous, unreasonable, or groundless." *Marquart*, 26 F.3d at 848 (citations omitted). Thus, "more rigorous standards apply for fee awards to prevailing defendants than to prevailing plaintiffs in Title VII cases." *Id.* (quotation and citation omitted). Only in "very narrow circumstances" is a

prevailing defendant entitled to an attorneys' fee award. *Id.* (quotation and citations omitted). "[A] court may not award attorneys' fees solely because the plaintiff did not prevail." *Id.* (citation omitted).

In announcing the "frivolous, unreasonable, or groundless" standard, *Christiansburg* did not address a scenario "involving multiple claims for relief that implicate a mix of legal theories and have different merits." *Fox*, 131 S. Ct. at 2213. "Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with this untidiness in awarding fees." *Id.* at 2213–14. The Supreme Court addressed the multiple-claim scenario in *Fox*, holding "that a court may grant reasonable fees to the defendant [where the plaintiff asserts both frivolous and nonfrivolous claims], but only for costs that the defendant would not have incurred but for the frivolous claims." *Id.* at 2211. The Court explained that "a defendant may deserve fees even if not all the plaintiff's claims were frivolous"; the defendant is entitled to relief for "expenses attributable to frivolous charges." *Id.* at 2214. The defendant's entitlement to relief "remains true when the plaintiff's suit also includes non-frivolous claims." *Id.* While a defendant "is not entitled to any fees arising from these non-frivolous charges," "the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed." *Id.* (citation omitted).

Pursuant to *Fox*, "a court may reimburse a defendant for costs under [§ 2000e–5(k)] even if a

plaintiff's suit is not wholly frivolous." *Id.* "Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees." *Id.* The core issue is "what work ... the defendant [may] receive fees for" when the "lawsuit involve[s] a mix of frivolous and non-frivolous claims." *Id.* "[A] defendant may not obtain compensation for work unrelated to a frivolous claim." *Id.* But a "defendant may receive reasonable fees for work related exclusively to a frivolous claim." *Id.* As to "work that helps defend against non-frivolous and frivolous claims alike—for example, a deposition eliciting facts relevant to both allegations," *id.*, the Court in *Fox* held that "a defendant may recover the reasonable attorney's fees he expended solely because of the frivolous allegations. And that is all." *Id.* at 2218. The district court is prohibited from awarding the defendant "compensation for any fees that he would have paid in the absence of the frivolous claims." *Id.*

As in *Fox*, this is a multiple-claims case involving at least one non-frivolous claim (Starke's claim). To properly apply the *Christiansburg–Fox* standard, we must first know why the district court concluded that a particular claim was frivolous, unreasonable, or groundless. *See Christiansburg*, 434 U.S. at 422, 98 S. Ct. 694. This is because, in a multiple-claims case, "[s]ome claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis." *Fox*, 131 S. Ct. at 2213–14. Second, if the district court concludes that "the plaintiff asserted both frivolous and non-frivolous claims," then

the court may award attorneys' fees "only for costs that the defendant would not have incurred but for the frivolous claims." *Id.* at 2211.

Here, the district court did not make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim upon which it granted summary judgment on the merits to CRST. The district court did not discuss specific claimants, choosing instead to make a universal finding that all of the EEOC's claims were without foundation. More problematic for our review is that the district court included in this universal finding claims for which we now find that CRST is not entitled to attorneys' fees—(1) the purported pattern-or-practice claim and (2) the claims dismissed for the EEOC's failure to satisfy its presuit obligations.

While we recognize that it is an arduous task, the *Christiansburg* standard requires the district court to make findings as to why a particular "claim was frivolous, unreasonable, or groundless." 434 U.S. at 422, 98 S. Ct. 694. Here, the district court did not make these particularized findings. Therefore, we necessarily remand to the district court to identify those claims dismissed because they were frivolous, unreasonable, or groundless. Because CRST *did not* prevail on Starke's non-frivolous claim, on remand, if the court concludes that a frivolous claim or claims exists, then it must necessarily apply the *Fox* standard to determine what fees, if any, CRST "expended solely because of the frivolous allegations." *Fox*, 131 S. Ct. at 2218.

4. Appellate Costs

Finally, the EEOC argues that the district court erred in awarding CRST its fees on appeal. First, it asserts that CRST should have filed its motion for appellate fees with this court, not the district court. Second, it contends that the district court failed to offer any explanation to support such an award.

Eighth Circuit Rule 47C governs motions for appellate fees and provides:

> (a) Motion for Fees. A motion for attorney fees, with proof of service, must be filed with the clerk within 14 days after the entry of judgment. The party against whom an award of fees is sought must file objections to an allowance of fees within 7 days after service. The court may grant on its own motion an allowance of reasonable attorney fees to a prevailing party.
>
> (b) Determination of Fees. On the court's own motion or at the request of the prevailing party, a motion for attorney fees may be remanded to the district court or administrative agency for appropriate hearing and determination.
>
> (c) Mandate. The clerk will prepare and certify an award of attorney fees granted by the court for insertion in the mandate. Issuance of a mandate will not be delayed for an award of attorney fees. If a mandate issues before final determination of a motion for attorney fees, the clerk of the district court, on the request of the clerk of this court, will add the award and its amendments to the mandate.

> "The usual practice for awarding fees and costs ... is for this Court to fix the compensation for services rendered before it, and for the District Court to do so for services rendered before it." *Little Rock Sch. Dist. v. State of Ark.*, 127 F.3d 693, 696 (8th Cir. 1997) (citing *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 138 (8th Cir. 1982) (en banc)). The purpose of Rule 47C is to permit "the court most familiar with the legal services in question" to make the fee award. *Id.*

But "Rule 47C cannot and does not affect the jurisdiction of the district courts." *Id.* Despite our local rule, "the district courts retain jurisdiction to decide attorneys' fees issues that we have not ourselves undertaken to decide." *Id.* "[D]iscretionary and practical considerations continue to be relevant to a district court's decision whether to grant a motion for attorneys' fees for services before an appellate court." *Id.* at 697. Rule 47C "is not a rigid jurisdictional rule." *Id.* It permits us "to grant attorneys' fees on [our] own motion" and exercise our "discretion to remand the question to the District Court, instead of determining the award [ourselves]." *Id.* (citing 8th Cir. R. 47C(a)-(b)). "The Rule thus preserves multiple procedural options for the determination of attorneys' fees." *Id.* Whether the district court or this court determines the appellate-fee award, the goal is the same: "calculation of a fair award." *Id.*

Although the district court in this case had the power to grant an attorneys' fees award, it could only do so after finding that the EEOC's "appeal was frivolous, unreasonable[,] or without foundation."

Barket, Levy, & Fine, Inc. v. St. Louis Thermal Energy Corp., 21 F.3d 237, 243 (8th Cir. 1994). "To find the appeal unreasonable, we must conclude that no reasonable person would have thought he could succeed on appeal; to find the appeal unfounded, we must conclude that the appeal had no foundation in law upon which the appeal could be brought." *Wrenn v. Gould*, 808 F.2d 493, 504 (6th Cir. 1987). "Although a district court's determination that the plaintiff's original action was frivolous or meritless may be probative of the efficacy of the appeal, such a determination is neither necessary nor sufficient to support an appellate award." *Bugg v. Int'l Union of Allied Indus. Workers of Am., Local 507 AFL–CIO*, 674 F.2d 595, 600 n.10 (7th Cir. 1982).

Here, the district court made no particularized findings as to why the EEOC's appeal to this court was frivolous, unreasonable, or without foundation; instead, it found only that "CRST is the prevailing party and that the *Christiansburg* standard is satisfied as to all of the claims that the EEOC appealed, other than the claim on behalf of Starke." *CRST III*, 2013 WL 3984478, at *19. The district court's conclusion that the EEOC's original action was frivolous, unreasonable, or groundless is insufficient to support an appellate award. *See Bugg*, 674 F.2d at 600 n.10. Furthermore, we have already concluded that the district court must make particularized findings on remand as to why it considers individual claims frivolous, unreasonable, or groundless. Therefore, we remand to the district court to consider anew whether CRST is entitled to an award of appellate fees. The district court must explain why "no reasonable person would have thought he could

succeed on appeal" or why "the appeal had no foundation in law." *Wrenn*, 808 F.2d at 504.

III. Conclusion

The present litigation has become what the Supreme Court cautioned against in *Fox*—"a second major litigation" over the attorneys' fees award. 131 S. Ct. at 2216. Nonetheless, remand is required in the present case for a reassessment of whether CRST is entitled to fees. In summary, we conclude that CRST is not entitled to an award of attorneys' fees for (1) claims that the district court dismissed based on the EEOC's failure to satisfy its presuit obligations and (2) the purported pattern-or-practice claim. On remand, the district court must individually assess each of the claims for which it granted summary judgment to CRST on the merits and explain why it deems a particular claim to be frivolous, unreasonable, or groundless. Because CRST *did not* prevail on Starke's non-frivolous claim, on remand, if the court concludes that a frivolous claim or claims exists, then it must necessarily apply the *Fox* standard to determine what fees, if any, CRST "expended solely because of the frivolous allegations." *Id.* at 2218. Thereafter, the district court must consider anew whether CRST is entitled to an award of appellate fees and explain why "no reasonable person would have thought he could succeed on appeal" or why "the appeal had no foundation in law." *Wrenn*, 808 F.2d at 504.

Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

Appendix B

United States District Court
N.D. Iowa
Cedar Rapids Division

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

CRST VAN EXPEDITED, INC., Defendant.
No. 07–CV–95–LRR.
Aug. 1, 2013.

ORDER

LINDA R. READE, Chief Judge.

I. INTRODUCTION

The matters before the court are Defendant CRST Van Expedited, Inc.'s ("CRST") "Bill of Costs" (docket no. 384) and "Motion for an Award of Its Reasonable Attorney[s'] Fees and Out–of–Pocket Expenses Pursuant to 42 U.S.C. § 2000e–5(k)" ("Motion for Attorneys' Fees") (docket no. 386).

II. RELEVANT PROCEDURAL HISTORY[1]

A. Underlying Action

1. Complaint

On September 27, 2007, the EEOC filed the instant lawsuit on behalf of Monika Starke "and a class of similarly situated female employees of [CRST]." Original Complaint at 1. Pursuant to Section 706 of Title VII, 42 U.S.C. § 2000e–5, the EEOC brought suit in its own name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint ("Complaint") (docket no. 8) at 1.[2] The EEOC generally alleged that Starke and the other similarly situated women "were adversely affected ... when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working

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[1] For purposes of the instant Order, the court finds it appropriate to provide only an abbreviated history of the case, beginning with the Equal Employment Opportunity Commission's ("EEOC") Original Complaint (docket no. 2) filed on September 27, 2007. A history of the administrative proceedings preceding the Original Complaint is included in the court's August 13, 2009 Order (docket no. 263) at 2–15. A more detailed procedural history and factual background is set forth in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 665–71 (8th Cir. 2012).

[2] The Complaint, filed on November 16, 2007, corrected a typographical error in the Original Complaint filed on September 27, 2007. *See* April 7, 2008 Order (docket no. 31) at 1 n.1.

environment based on their gender, and CRST failed to prevent, correct, and protect them." *Id.*

The heart of the Complaint contains the following specific allegations against CRST:

> 7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e–2 and 2000e–3. Among other things, two of its lead drivers subjected Starke to sexual harassment during their supervision of [her] (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.
>
> 8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and

> offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.
>
> 9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive Starke and a class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

Id. at 2–3. The EEOC further alleged that CRST's actions "were intentional" and "done with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees." *Id.* at 3.

In the Complaint, the EEOC asked the court for "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment [and] any other employment practice which discriminates on the basis of sex." *Id.* at 4. The EEOC further asked the court to "[o]rder CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices." *Id.* Finally, the EEOC asked the court to order CRST to pay Starke and the similarly situated female employees compensatory damages, punitive damages and ordinary costs. *Id.*

On November 30, 2007, CRST filed an Answer (docket no. 11), which denied the allegations in the Complaint and asserted affirmative defenses. On May 1, 2008, CRST filed an Amended Answer (docket no. 36).

2. The "moving target"

On February 8, 2008, the court entered a Scheduling Order and Discovery Plan (docket no. 21), setting forth discovery deadlines and establishing a trial ready date of May 15, 2009. By August 2008, the EEOC had still not identified the total number of individuals included in the "class of similarly situated female employees," Complaint at 1, on behalf of whom it sought relief. On August 7, 2008, the EEOC requested that the court modify the Scheduling Order and Discovery Plan to extend the deadline for identifying medical or psychological expert witnesses. EEOC's Motion to Modify Scheduling Order (docket no. 37). The following day, CRST responded to the EEOC's request, expressing concern that the EEOC had "proposed [no] end date for its identification of class members" and requesting that the court establish a deadline. CRST's Response to EEOC's Motion to Modify Scheduling Order (docket no. 38) at 3. On August 18, 2008, the EEOC replied with a proposed deadline of December 7, 2008, noting that "[t]his is an EEOC pattern-or-practice class action," that it had so far identified "49 class members" and that it expected "that the total class [would] reach between 100 and 150 individuals." EEOC's Response to CRST's Request for Class Member Identification Deadline (docket no. 42) at 1–2. On August 20, 2008, the court established a

deadline of October 15, 2008, for the EEOC to disclose the individuals included in the "class." August 20, 2008 Order (docket no. 44) at 3.

On or before October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved individuals.[3] On November 6, 2008, CRST filed the Motion for an Order to Show Cause, in which CRST opined that the EEOC's disclosures included individuals who had not affirmatively agreed to participate in the lawsuit and individuals the EEOC did not have a good-faith reason to believe were victims of actionable sex discrimination.

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[3] The number of allegedly aggrieved individuals varied considerably between October 15, 2008, and May 12, 2009. *See* CRST's Motion Under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members ("Motion for an Order to Show Cause") (docket no. 56) at 2 n.1 (noting that the EEOC's disclosures contained a total of 293 names but that communications with the EEOC's counsel indicated there were 275 allegedly aggrieved individuals); EEOC's November 21, 2008 Corrected List of Class Members (docket no. 68) (listing 274 allegedly aggrieved individuals); EEOC's December 11, 2008 Updated List of Class Members (docket no. 85) (listing 270 allegedly aggrieved individuals); EEOC's January 13, 2009 Updated List of Class Members (docket no. 111) (listing 263 allegedly aggrieved individuals); EEOC's January 22, 2009 Updated List of Class Members (docket no. 121) (listing 253 allegedly aggrieved individuals); EEOC's March 11, 2009 Updated List of Class Members (docket no. 159) (listing 254 allegedly aggrieved individuals, 156 of whom the EEOC was still pursuing relief on behalf of); EEOC's May 12, 2009 Updated List of Class Members (docket no. 224) (listing 255 allegedly aggrieved individuals, 146 of whom the EEOC was still pursuing relief on behalf of). The EEOC's filings subsequent to May 12, 2009, consistently refer to 255 allegedly aggrieved individuals.

Thus, CRST requested that the court strike those categories of allegedly aggrieved individuals.

On November 19, 2008, the court denied CRST's Motion for an Order to Show Cause. November 19, 2008 Order (docket no. 66) at 7–8. Specifically, the court accepted the EEOC's representation that "it had a good-faith belief that each and every one of the approximately 270 women disclosed to CRST [had] an actionable claim for sex discrimination." *Id.* at 8. The court, however, warned the EEOC that, "[i]f during the course of discovery CRST discover[ed] evidence that shed[ ] doubt on the EEOC's representations to the court, CRST [could] file an appropriate motion." *Id.* The court also expressed concern that "CRST might unfairly face a 'moving target' of prospective plaintiffs" and, consequently, the court ordered the EEOC to: (1) immediately file with the court a corrected list of the approximately 270 individuals it disclosed as of October 15, 2008; (2) make all individuals on such list available to CRST for a deposition before the conclusion of discovery on January 15, 2009; and (3) update the allegedly aggrieved individual list as necessary. *Id.* at 8–9.

Although the EEOC complied with the court's directive and filed updated and corrected lists of allegedly aggrieved individuals, it failed to make all of the identified individuals available for deposition before January 15, 2009. Accordingly, on February 19, 2009, consistent with its November 19, 2008 Order, the court barred the EEOC from pursuing relief for any individual not made available for deposition before the deadline. February 19, 2009 Order (docket no. 153). On

March 11, 2009, the EEOC filed an Updated List of Class Members, which listed 155 allegedly aggrieved individuals for whom the EEOC was still pursuing relief and 99 individuals who the EEOC alleged were sexually harassed but for whom the EEOC was not pursuing relief based on the court's February 19, 2009 Order.[4] On April 16, 2009, the court entered an Order (docket no. 193), which further precluded the EEOC from offering evidence related to the 99 individuals who the EEOC had not produced for deposition.

3. Summary judgment rulings

Between April 30, 2009, and August 13, 2009, the court ruled on CRST's various motions for summary judgment. First, on April 30, 2009, the court granted CRST's "Motion for Summary Judgment on [the] EEOC's Pattern and Practice Claim" (docket no. 150). April 30, 2009 Order (docket no. 197) at 67. Specifically, the court held that, to the extent the EEOC asserted a pattern or practice claim, such claim was dismissed with prejudice and, consequently, CRST was liable only

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[4] The March 11, 2009 Updated List of Class Members actually listed 156 individuals for whom the EEOC was still pursuing relief and 98 individuals for whom the EEOC was no longer pursuing relief. The EEOC later noted that the list erroneously included Karen Shank as an individual for whom the EEOC sought individual relief despite the fact that Shank was not offered for deposition. *See* EEOC's Response to CRST's Motion to Strike (docket no. 187) at 2 n.2. Accordingly, as of March 11, 2009, there were in fact 99 individuals on the list that CRST had not offered for deposition. However, as the court explains in note 6, *infra*, the EEOC removed one of those individuals, Lori Essig, from its subsequent Updated Lists of Class Members. Thus, out of the final 255 claims, 98 were dismissed as a discovery sanction.

to the extent the EEOC could prove individual claims of sexual harassment. *Id.*

Second, on May 11, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Based on Statute of Limitations and Other Grounds" (docket no. 147). May 11, 2009 Order (docket no. 223) at 25. In the May 11, 2009 Order, the court found that the applicable statute of limitations barred the EEOC from seeking relief on behalf of 9 individuals and barred, in part, the EEOC from seeking relief on behalf of another 3 individuals. *Id.* at 25–26.

Third, on May 13, 2009, the court granted CRST's "Motion for Summary Judgment Based on Judicial Estoppel" (docket no. 144). May 13, 2009 Order (docket no. 225) at 14. Specifically, the court found that 3 individuals, including Starke, were judicially estopped from seeking relief from CRST and, furthermore, the EEOC was also barred from seeking relief on their behalf. *Id.*

Fourth, on June 2, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Against the Claims of Certain of the Interveners" (docket no. 145). June 2, 2009 Order (docket no. 249) at 38–39.[5] Specifically, the court concluded that Janet Boot's claims were "frivolous,"

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[5] On September 26, 2008, the court granted Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Starke and Latetsha Thomas's request to intervene. September 26, 2008 Order (docket no. 48) at 7. Because CRST does not request fees or costs from any of these individuals, the court omits the procedural history relating to these Plaintiffs–Interveners.

finding that her claims were barred by the court's previous rulings and, even if they were not, she failed to generate a genuine issue of material fact as to CRST's knowledge of the alleged harassment and failure to take proper remedial action. *Id.* at 17–18. The court also dismissed Remcey Jeunenne Peeples's claims and Nicole Cinquemano's sexual harassment claims, finding that CRST did not have actual or constructive knowledge of the alleged harassment. *Id.* at 23–24, 29. The court further held that the EEOC was barred from seeking relief at trial to the same extent these Plaintiffs–Interveners were barred. *Id.* at 39.

Fifth, on June 18, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Based on Class Members' Failure to Report the Alleged Harassment and/or CRST's Prompt and Effective Response to Reported Harassment" (docket no. 146). June 18, 2009 Order (docket no. 251) at 13. In its June 18, 2009 Order, the court found that the EEOC was barred from seeking relief on behalf of 11 individuals because CRST did not know or have reason to know that they were sexually harassed and 4 individuals because CRST adequately addressed the sexual harassment.

Sixth, on July 6, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Against Class Members Who Did Not Experience Severe or Pervasive Sexual Harassment" (docket no. 148). July 6, 2009 Order (docket no. 256) at 14. Specifically, in its July 6, 2009 Order, the court found that the EEOC had failed to generate a genuine issue of material fact as to whether 11 individuals had

experienced severe or pervasive sexual harassment and, consequently, held that the EEOC was barred from seeking relief on their behalf.

Seventh, on July 9, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Against Class Members Whose Claims Fail on Two or More Grounds" (docket no. 149). July 9, 2009 Order (docket no. 258) at 7. In the July 9, 2009 Order, the court barred the EEOC from seeking relief on behalf of 46 individuals. Specifically, the EEOC conceded that, in light of the court's April 30, 2009 Order dismissing any pattern or practice claim, 4 individuals did not suffer actionable sexual harassment and, accordingly, the court barred the EEOC from seeking relief on behalf of those individuals. The court further found that a reasonable jury could not find 42 individuals suffered from actionable sexual harassment because they did not suffer severe or pervasive sexual harassment and/or there was insufficient evidence to show that CRST knew or should have known that the individuals suffered sexual harassment yet failed to take proper remedial action.

Finally, on August 13, 2009, the court found that the EEOC was barred from seeking relief on behalf of the remaining 67 allegedly aggrieved individuals. August 13, 2009 Order at 39–40. Specifically, the court found that the EEOC "wholly abandoned its statutory duties" as to the remaining 67 allegedly aggrieved individuals because it: (1) failed to investigate such individuals' claims until after the EEOC filed the Complaint; (2) failed to include those individuals as members in the Letter of Determination's "class" until after the EEOC

filed the Complaint; (3) failed to make a reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved individuals; and (4) did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved individuals prior to filing the Complaint. *Id.* at 31–32. The court concluded that "dismissal [was] a severe but appropriate remedy." *Id.* at 38.

Thus, in light of the court's findings in its August 13, 2009 Order and in its prior orders, the EEOC was barred from pursuing relief on behalf of all 255 allegedly aggrieved individuals the EEOC had identified and, consequently, the court dismissed the Complaint in its entirety.[6] *Id.* at 40. The court further

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[6] Following the court's August 13, 2009 Order, the EEOC was barred from pursuing relief on behalf of: (1) 98 individuals as a discovery sanction, *see* February 19, 2009 Order and April 16, 2009 Order; (2) 9 individuals because of the applicable statute of limitations, *see* May 11, 2009 Order; (3) 3 individuals because of the doctrine of judicial estoppel, *see* May 13, 2009 Order; (4) 3 individuals because their claims were barred by the court's prior rulings or because the EEOC failed to generate a genuine issue of material fact as to CRST's knowledge of the alleged harassment and failure to take proper remedial action, *see* June 2, 2009 Order; (5) 15 individuals because they failed to report the alleged harassment and/or CRST promptly and effectively responded to the reported harassment, *see* June 18, 2009 Order; (6) 11 individuals because the EEOC failed to generate a genuine issue of material fact as to whether such individuals experienced severe or pervasive sexual harassment, *see* July 6, 2009 Order; (7) 46 individuals because they did not suffer severe or pervasive sexual harassment and/or there was insufficient evidence to show that CRST knew or should have known that the individuals suffered sexual harassment yet failed to take proper remedial action, *see* July 9, 2009 Order; and (8) 67 individuals because the EEOC failed

ordered the EEOC to pay CRST's ordinary costs, which CRST could request 10 days after disposition of the entire case. *Id.* Finally, the court determined that CRST was a "prevailing party" as to the EEOC and, pursuant to 42 U.S.C. § 2000e–5(k), CRST could seek attorneys' fees from the EEOC within 20 days after disposition of the entire case. *Id.*

In accordance with the court's August 13, 2009 Order, the Clerk of Court entered a Judgment (docket no. 279) on October 1, 2009, finding the EEOC "takes

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to investigate, issue a reasonable cause determination and conciliate their claims, *see* August 13, 2009 Order. Furthermore, the EEOC withdrew its claim on behalf of one individual, Gwen Allen. *See* EEOC's May 22, 2009 Updated List of Class Members (docket no. 237) at 1 n.1 (noting that the EEOC "removed Gwen Allen from the list of class members for whom it seeks relief" because "she requested that [the] EEOC no longer seek relief on her behalf"). Finally, two other individuals, Susan Guy and Sarah Ragland, inexplicably appeared on the EEOC's May 12, 2009 Updated List of Class Members as allegedly aggrieved individuals for whom the EEOC was not seeking relief, although these two individuals did not appear on the EEOC's March 11, 2009 Updated List of Class Members.

> The court further notes that, although the court referenced 99 individuals in its April 16, 2009 Order barring the EEOC from pursuing relief on behalf of those individuals it failed to produce for deposition, the EEOC removed one of those individuals, Lori Essig, from its subsequent Updated Lists of Class Members.
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> Thus, by August 13, 2009, the claims of all 255 allegedly aggrieved individuals for whom the EEOC sought relief had either been dismissed by the court or withdrawn by the EEOC.

nothing and this action is dismissed." October 1, 2009 Judgment at 1.

4. Original cost and fee determination

On October 16, 2009, CRST filed a Bill of Costs (docket no. 280) pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920, and, on October 30, 2009, CRST filed a "Motion for Attorneys' Fees and Costs" (docket no. 282) pursuant to 42 U.S.C. § 2000e–5(k). After receiving extensive briefing on the issues, the court awarded CRST $92,842.21 in costs, $4,004,371.65 in attorneys' fees and $463,071.25 in out-of-pocket expenses, for a total of $4,560,285.11. February 9, 2010 Order (docket no. 320) at 39; *see also* February 9, 2010 Judgment (docket no. 321).

B. Appeal

The EEOC appealed the court's dismissal of 107 of its individual claims, and, on May 8, 2012, the Eighth Circuit Court of Appeals affirmed in part, reversed in part and remanded the case to this court for further proceedings. *See CRST*, 679 F.3d at 695. Specifically, the Eighth Circuit Court of Appeals reversed the court's grant of summary judgment on the EEOC's claim on behalf of Starke, finding that the EEOC was not judicially estopped from pursuing relief on behalf of Starke. *Id.* at 682, 695. Furthermore, the Eighth Circuit Court of Appeals reversed the court's grant of summary judgment on the EEOC's claim on behalf of Tillie Jones, finding that the EEOC produced sufficient evidence to create a genuine issue of material fact as to the severity or pervasiveness of the harassment that Jones allegedly suffered. *Id.* at 687–88, 695. The Eighth

Circuit Court of Appeals further vacated, without prejudice, the court's award of attorneys' fees because, "in light of [its] rulings, CRST [was] no longer a 'prevailing' defendant" under 42 U.S.C. § 2000e–5(k). *Id.* at 694–95. Judge Murphy concurred in part and dissented in part. *Id.* at 695–98.

C. History on Remand

On September 17, 2012, the formal Mandate (docket no. 345) issued and the case returned to this court for further proceedings on the EEOC's claims on behalf of Starke and Jones. On October 11, 2012, the EEOC withdrew its claim on behalf of Jones, explaining that the "law of the case" precluded the EEOC from seeking relief on her behalf because it had not exhausted Title VII's administrative prerequisites as to her claim. Notice of Withdrawal of Claim for Tillie Jones (docket no. 360) at 1.

On February 8, 2013, CRST and the EEOC filed a joint "Motion for Entry of Order of Dismissal" (docket no. 379), in which the parties stated:

> Dismissal is required by (a) the Eighth Circuit [Court of Appeals'] affirmance, with the exception of [the] EEOC's claims on behalf of ... Jones and ... Starke, of this [c]ourt's October 1, 2009 Judgment; (b) [the] EEOC's withdrawal on October 11, 2012, of its claim on behalf of ... Jones on the ground that it was barred by this [c]ourt's Order of August 13, 2009; and (c) [the] EEOC's and CRST's settlement of [the] EEOC's claim on behalf of ... Starke pursuant to the Settlement Agreement attached to this motion as Exhibit 1.

> Therefore, all of [the] EEOC's claims have now been resolved.

Motion for Entry of Order of Dismissal at 1 (citation omitted). In the attached Settlement Agreement (docket no. 379–1), CRST agreed to pay $50,000 in settlement of the EEOC's claim on behalf of Starke. The Settlement Agreement further provided:

> 4. This Agreement does not preclude CRST from pursuing attorney[s'] fees and costs pursuant to the Order of the Eighth Circuit [Court of Appeals] dated May 8, 2012.
>
> 5. Further, this Agreement does not preclude either [the] EEOC or CRST from making any arguments relating to CRST's pursuit of attorney[s'] fees and costs, including arguments relating to whether [the] EEOC or CRST is the prevailing party.

Settlement Agreement at 2. On February 8, 2013, the court dismissed the case with prejudice. February 8, 2013 Order (docket no. 380). That same date, the Clerk of Court entered a Judgment (docket no. 381) in accordance with the court's February 8, 2013 Order.

D. Bill of Costs and Motion for Attorneys' Fees

On March 18, 2013, CRST filed the Bill of Costs and the Motion for Attorneys' Fees. On April 15, 2013, the EEOC filed a Resistance to CRST's Bill of Costs ("Resistance to the Bill of Costs") (docket no. 388), and, on April 16, 2013, the EEOC filed a Resistance to CRST's Motion for Attorneys' Fees ("Resistance to the Motion for Attorneys' Fees") (docket no. 391). On April

30, 2013, CRST filed a Reply to the EEOC's Resistance to the Bill of Costs and Resistance to the Motion for Attorneys' Fees ("CRST's Reply") (docket no. 394). On May 7, 2013, the EEOC filed a Sur–Reply ("EEOC's Sur–Reply") (docket no. 397). Finally, on July 11, 2013, the parties jointly filed a Supplemental Authority (docket no. 398), which attached the United States Supreme Court's recent decision in *Vance v. Ball State University*, 131 S. Ct. 2434 (2013).

Neither party requests oral argument on the Bill of Costs or the Motion for Attorneys' Fees, and the court finds that a hearing is unnecessary. The Bill of Costs and the Motion for Attorneys' Fees are fully submitted and ready for decision.

III. MOTION FOR ATTORNEYS' FEES

Title 42, United States Code, Section § 2000e–5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e–5(k). Thus, under the statute, only a "prevailing party" may request attorneys' fees and out-of-pocket expenses. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the United States Supreme Court set forth an additional requirement for prevailing defendants—that is, a prevailing defendant is only entitled to attorneys' fees and out-of-pocket

expenses when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. If this standard is satisfied, a court may award a prevailing defendant reasonable attorneys' fees and out-of-pocket expenses.

The court shall begin by determining whether CRST is a "prevailing party" within the meaning of 42 U.S.C. § 2000e–5(k). Because the court concludes that it is, the court then turns to consider whether the EEOC's action was frivolous, unreasonable or without foundation under *Christiansburg*. Finally, because the court concludes that the *Christiansburg* standard is met, the court shall turn to consider whether CRST's requested attorneys' fees and out-of-pocket expenses are reasonable.

A. Prevailing Party

1. Parties' arguments

In the Brief in Support of the Motion for Attorneys' Fees, CRST notes that the court previously determined that CRST was a prevailing party and awarded CRST its reasonable attorneys' fees and expenses. CRST contends that, following the Eighth Circuit Court of Appeals' decision and the remanded proceedings, it is still "the prevailing party as to all [of the] EEOC['s] claims except one claim on behalf of ... Starke." Brief in Support of the Motion for Attorneys' Fees (docket no. 386–1) at 12. CRST argues that, under *Fox v. Vice*, —U.S. ——, 131 S. Ct. 2205 (2011), a defendant need not prevail on all claims in order to qualify as a prevailing party. Rather, "[a] defendant is

entitled to an award of its reasonable fees as to all claims on which it prevailed provided those claims were not closely related to the claim or claims on which it did not prevail." Brief in Support of the Motion for Attorneys' Fees at 12. In this case, CRST contends that it prevailed on the EEOC's pattern-or-practice claim and prevailed on all of the EEOC's individual claims other than its claim on behalf of Starke. Accordingly, CRST maintains that, assuming it is able to satisfy the *Christiansburg* standard, it is entitled to an award of its attorneys' fees incurred in defending against all claims except the claim on behalf of Starke.

In its Resistance to the Motion for Attorneys' Fees, the EEOC contends that its success on Starke's claim makes it the prevailing party and, consequently, CRST is not entitled to any attorneys' fees. The EEOC points to the fact that the Eighth Circuit Court of Appeals "reversed the original fee award because, after the Eighth Circuit [Court of Appeals] ruled that [the] EEOC could proceed on behalf of ... Starke, CRST was no longer the prevailing party." Resistance to the Motion for Attorneys' Fees at 5. The EEOC maintains that, because the EEOC succeeded on its claim on behalf of Starke after the Eighth Circuit Court of Appeals remanded the case, CRST cannot be the prevailing party. Moreover, the EEOC notes that, under *Marquart v. Lodge 837, International Association of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994), a defendant is only a prevailing party when there has been a judicial determination that the plaintiff's claim lacks merit. In this case, the EEOC contends that the court's dismissal

of individual claims as a discovery sanction or due to the EEOC's failure to satisfy Title VII's administrative prerequisites for suit is not a judicial determination on the merits. Thus, the EEOC urges the court to find that CRST is not the prevailing party and, therefore, not entitled to its attorneys' fees and expenses.

2. Applicable law

In *Marquart*, the Eighth Circuit Court of Appeals articulated a standard for determining when a defendant is a prevailing party. *Marquart*, 26 F.3d 842. The Eighth Circuit Court of Appeals began by looking at the Supreme Court's analysis in *Christiansburg* and the "dual policy considerations underlying" 42 U.S.C. § 2000e–5(k)—that is, "[t]o discourage the litigation of frivolous, unreasonable, groundless, or vexatious claims, but without discouraging the rigorous enforcement of federal rights under Title VII." *Id.* at 849. In light of the United States Supreme Court's holding in *Christiansburg* that a prevailing defendant is entitled to attorneys' fees only when the plaintiff's claim is frivolous, unreasonable or groundless, the Eighth Circuit Court of Appeals concluded that a defendant is a prevailing party within the meaning of 42 U.S.C. § 2000e–5(k) only when there has been "a judicial determination of the plaintiff's case on the merits," such as an order granting a defendant's motion for summary judgment on the merits. *Id.* at 852.

Thus, a court may "grant prevailing party status to a Title VII defendant only in very narrow circumstances." *Id.* A plaintiff's voluntary dismissal of a case, for example, is generally not a judicial determination on the merits of the plaintiff's case. *Id.*

(finding that a voluntary dismissal is ordinarily not a judicial determination on the merits but suggesting that when a plaintiff voluntarily dismisses a complaint "to escape a disfavorable judicial determination on the merits," an award of attorneys' fees to the defendant may be warranted). Furthermore, the court's dismissal of a complaint for lack of subject matter jurisdiction is not a judicial determination on the merits of the plaintiff's case. *See Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990) ("Where a complaint has been dismissed for lack of subject matter jurisdiction, the '[d]efendant has not "prevailed" over the plaintiff on any issue central to the merits of the litigation.' " (alteration in original) (quoting *Sellers v. Local 1598*, 614 F. Supp. 141, 144 (E.D. Pa. 1985), *aff'd*, 810 F.2d 1164 (3d Cir. 1987))).

A defendant need not prevail on every claim in order to be entitled to attorneys' fees under 42 U.S.C. § 2000e–5(k). *See Fox*, 131 S. Ct. at 2214 ("Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees."). Rather, the United States Supreme Court has recognized that, in some situations, "a court could properly award fees to both parties-to the plaintiff, to reflect the fees he incurred in bringing the meritorious claim; and to the defendant, to compensate for the fees he paid in defending against the frivolous one." *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.10 (1983)). However, when a defendant is a prevailing party as to only some of the plaintiff's claims, the defendant may "receive only the portion of his

[attorneys'] fees that he would not have paid but for the frivolous claim[s]." *Id.* at 2215.

3. Discussion

In this case, the court previously determined that CRST was a prevailing party. *See* August 13, 2009 Order at 40 ("Now that CRST is a 'prevailing party' as to the EEOC, 42 U.S.C. § 2000e–5(k), CRST may file an application for attorneys' fees from the EEOC...."); February 9, 2010 Order at 12 (noting that the "court previously found that CRST is a 'prevailing party' as to the EEOC" and citing the August 13, 2009 Order). The question the court must now consider is whether the result of the proceedings on appeal and on remand changes the court's earlier conclusion.

a. Single claim versus multiple claims

The EEOC contends that this case was comprised of a single claim and that it won that claim. The court finds that this argument is without merit. It is difficult discern how a Complaint requesting relief on behalf of "Starke and a class of similarly situated female employees," Complaint at 1, under § 706 of Title VII contains only *one* claim. "[I]t is axiomatic that [under § 706] the EEOC stands in the shoes of ... aggrieved persons in the sense that it must prove all of the elements of their sexual harassment claims to obtain relief for them." April 30, 2009 Order at 18. Thus, the EEOC was required to prove the elements of a sexual harassment claim as to each individual to obtain relief on behalf of that individual. Given the way the EEOC drafted its Complaint, CRST—and the court, for that matter—did not know how many individuals the EEOC

was pursuing relief on behalf of until the litigation was well under way. But, on the face of the Complaint, it is clear that the EEOC sought relief on behalf of at least two individuals and, thus, there were at least two claims. By October 15, 2008, it became clear that the EEOC was asserting approximately 270 claims, although that number dropped to 255 by May 12, 2009. Thus, it is clear that this case contained multiple and distinct claims for relief.

Incidentally, the court notes that the EEOC's contention that this case had only one claim could lead to truly absurd results. As the court noted above, the first step in determining whether a party is entitled to attorneys' fees under 42 U.S.C. § 2000e–5(k) is to determine whether the party is a "prevailing party"—that is, the court does not reach the *Christiansburg* test unless it first finds that a defendant qualifies as a prevailing party. The EEOC, in essence, argues that, as long as it names one individual in a complaint and succeeds as to that individual, it can include as many frivolous allegations as it wishes in a complaint using the vague language "and a class of similarly situated individuals" without ever being liable for a defendant's attorneys' fees. Such a result clearly contravenes the congressional policy embodied in 42 U.S.C. § 2000e–5(k), as interpreted in *Christiansburg*. *See Christiansburg*, 434 U.S. at 420 (explaining that Congress enacted 42 U.S.C. § 2000e–5(k) "to clear the way for suits to be brought under [Title VII], [but] also ... to protect defendants from burdensome litigation having no legal or factual basis"). The EEOC cannot avoid liability for attorneys' fees simply by artfully

crafting a complaint using vague language to hide frivolous allegations.

Thus, the court concludes that the EEOC asserted multiple and distinct claims against CRST. The EEOC is correct that CRST did not prevail on one such claim.[7] However, under *Fox*, CRST need not prevail on every claim to be entitled to an award of attorneys' fees. Accordingly, the court next turns to consider whether there was a judicial determination on the merits in favor of CRST on each claim other than the claim on behalf of Starke.

b. Judicial determination on the merits

The EEOC argues that, "even if [it] were not the prevailing party for fee purposes, CRST would still not be a prevailing defendant, where a large portion of the claim was not determined on the merits." EEOC's Sur–Reply at 3. Specifically, while the EEOC acknowledges that "CRST defeated the claim on the merits for 83 women for whom it was granted summary judgment," the EEOC argues that "CRST won on

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[7] The parties argue at great length as to whether the EEOC is the prevailing party on the claim on behalf of Starke. *See* Resistance to the Motion for Attorneys' Fees at 13; CRST's Reply at 5–6; EEOC's Sur–Reply at 1–2. The court finds that it is unnecessary to address the parties' arguments on this issue. As the EEOC acknowledges in its Resistance to the Motion for Attorneys' Fees, it is not entitled to a fee award under 42 U.S.C. § 2000e–5(k). *See* Resistance to the Motion for Attorneys' Fees at 7 n.5 ("[The] EEOC does not, of course, seek fees for itself since § 2000e–5(k) allows for fees to prevailing parties 'other than the Commission or the United States.'" (quoting 42 U.S.C. § 2000e–5(k))). Thus, it is of no consequence whether the EEOC qualifies as a prevailing party.

reasons other than the merits as to [98] of the women who were never deposed, and as to 67 women for whom ... [the] EEOC failed to meet the statutory prerequisites for suit." *Id.* The EEOC's argument fails. As discussed above, the EEOC's characterization of this suit as a single claim is incorrect. Rather, the court must examine each claim to determine whether CRST received a judicial determination on the merits.

The court begins by looking at its April 30, 2009 Order dismissing with prejudice the EEOC's pattern-or-practice claim. The EEOC now contends that it never asserted a pattern-or-practice claim but, rather, intended to use a pattern-or-practice method of proof. For the reasons set forth in the court's April 30, 2009 Order, the court finds that CRST justifiably filed a motion for summary judgment on the pattern-or-practice claim given the confusion the EEOC created as to whether it was pursuing such a claim. *See* April 30, 2009 Order at 24–26. The court granted CRST's motion for summary judgment, finding "that the EEOC ... presented insufficient evidence to show that CRST ... engaged in a pattern or practice of tolerating sexual harassment of its female drivers." *Id.* at 57. This is a judicial determination on the merits in favor of CRST and, consequently, CRST is the prevailing party as to the EEOC's pattern-or-practice claim.

Following the court's dismissal of the EEOC's pattern-or-practice claim, the EEOC was required to prove each individual claim of sexual harassment. At that stage in the litigation, there were 154 allegedly aggrieved individuals remaining and, thus, CRST was

required to defend against 154 sexual harassment claims.[8] The court granted summary judgment in favor of CRST on each of the remaining 154 claims, and the Eighth Circuit Court of Appeals affirmed the court's grant of summary judgment as to each claim that the EEOC appealed, other than the claims on behalf of Starke and Jones.

While the EEOC acknowledges that the court granted summary judgment on the merits on some of those 154 claims, the EEOC contends that the court's dismissal of claims due to the EEOC's failure to satisfy the Title VII administrative prerequisites is not a judicial determination on the merits. The court disagrees. When it is the EEOC, as opposed to an individual, bringing suit, Title VII imposes an additional element of a claim to relief. That is, in addition to proving the usual elements of a sexual

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[8] As the court previously noted, the EEOC initially identified approximately 270 individuals. That number varied considerably over the months until May 12, 2009, when the EEOC began to consistently refer to 255 allegedly aggrieved individuals. *See* May 12, 2009 Updated List of Class Members. Of those 255 individuals, the EEOC was barred from seeking relief on behalf of 98 as a discovery sanction. The EEOC, apparently, voluntarily withdrew its claims on behalf of 3 of the remaining individuals. *See supra* note 6 (noting that the EEOC voluntarily removed Gwen Allen's name from the list of individuals it was still seeking relief on behalf of and further noting that two other individuals, Susan Guy and Sarah Ragland, inexplicably appeared on the list of allegedly aggrieved individuals for whom the EEOC was no longer seeking relief). Thus, there was no judicial determination on the merits as to those 101 claims. CRST's various motions for summary judgment addressed the remaining 154 individuals.

harassment claim, the EEOC must also establish that it pursued an administrative resolution. This is not a jurisdictional prerequisite; rather, it is an ingredient of the EEOC's claim. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (holding that Title VII's employee-numerosity requirement "is an element of a plaintiff's claim for relief, not a jurisdictional issue"); *EEOC v. Argo Distrib., LLC*, 555 F.3d 462, 469 (5th Cir. 2009) ("[T]he EEOC's conciliation requirement is a precondition to suit but not a jurisdictional prerequisite."). Thus, the court's dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations is a dismissal on the merits of the EEOC's claims.

Finally, although the EEOC did not raise the issue, the court finds it appropriate to discuss whether CRST is a prevailing party as to Jones's claim. The Eighth Circuit Court of Appeals reversed the court's finding that Jones was not subjected to severe or pervasive sexual harassment and, consequently, remanded the EEOC's claim on her behalf. On remand, the EEOC voluntarily withdrew its claim on behalf of Jones in accordance with the "law of the case"—that is, the EEOC acknowledged that it had not satisfied the Title VII administrative prerequisites as to that claim. *See* Notice of Withdrawal of Claim for Tillie Jones at 1 (noting that "the law of the case, specifically this [c]ourt's order of August 13, 2009 ..., bars its claim on behalf of ... Jones"). While *Marquart* held that a plaintiff's voluntary dismissal is generally not a judicial determination on the merits, the Eighth Circuit Court of Appeals suggested that a defendant may be considered a prevailing party when a plaintiff

voluntarily dismisses a claim to avoid an adverse judicial determination. *See Marquart*, 26 F.3d at 852. Here, had the EEOC not withdrawn its claim on behalf of Jones, the court would have dismissed it pursuant to its August 13, 2009 Order. Thus, the court concludes that CRST is a prevailing party as to the EEOC's claim on behalf of Jones.

c. Summary

In light of the foregoing, the court finds that CRST is the prevailing party on the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims. CRST is not the prevailing party on the EEOC's claim on behalf of Starke, the 98 claims the court dismissed as a discovery sanction or 3 of the claims the EEOC withdrew. Pursuant to *Christiansburg*, the court shall now turn to consider whether those claims on which CRST prevailed are frivolous, unreasonable or groundless.

B. Christiansburg Standard

1. Parties' arguments

In the Brief in Support of the Motion for Attorneys' Fees, CRST notes that the court previously found the *Christiansburg* standard was satisfied due to the EEOC's unreasonable failure to comply with Title VII's pre-suit obligations. CRST further notes that the Eighth Circuit Court of Appeals "affirmed without qualification" the court's dismissal of such claims. Brief in Support of the Motion for Attorneys' Fees at 14. Accordingly, CRST contends that the court's prior ruling still applies. CRST also contends that the *Christiansburg* standard is satisfied as to the EEOC's

other claims because, in the course of the underlying litigation, CRST "demonstrated that [the] EEOC did not have a prima facie basis for its pattern-or-practice claim or 75 % of its individual claims." *Id.* at 15.

In its Resistance to the Motion for Attorneys' Fees, the EEOC argues that the "landscape ... has changed considerably" since the court's original fee award. Resistance to the Motion for Attorneys' Fees at 9. Specifically, the EEOC contends that its position with regard to its pre-suit obligations cannot be considered "unreasonable" because Judge Murphy accepted the EEOC's position in her dissent. The EEOC maintains that, "[w]hen a dissent accepts a party's position on such a critical element of the case, the action cannot be considered unreasonable." *Id.* Moreover, the EEOC alleges that the Eighth Circuit Court of Appeals created a new rule when it held that the EEOC must investigate and attempt to conciliate "individual victims of a class claim." *Id.* at 10. The EEOC argues that, at the time it filed the lawsuit in this case, there was "long standing and consistent precedent" supporting its position that it need not investigate and attempt to conciliate each individual claim. *Id.* Even if the court were to find the EEOC's failure to satisfy its presuit obligations was unreasonable, the EEOC contends that CRST is only entitled to attorneys' fees incurred in defending against frivolous claims and, because this case is a "single claim of a hostile work environment [that cannot] be broken into separate 'claims,'" CRST is not entitled to any fees. *Id.* at 15. Finally, the EEOC maintains that it never asserted a

pattern-or-practice claim and the individual claims that it did assert had a "valid evidentiary basis." *Id.* at 17.

2. Applicable law

In interpreting 42 U.S.C. § 2000e–5(k), "the [United States] Supreme Court has distinguished between prevailing Title VII plaintiffs and prevailing Title VII defendants." *Marquart*, 26 F.3d at 848. A district court may award attorneys' fees to a prevailing plaintiff "'in all but very unusual circumstances.'" *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975)). However, an award of attorneys' fees to a prevailing defendant is appropriate in much more limited circumstances.

In *Christiansburg*, the United States Supreme Court outlined the principles that guide a district court's discretion when it decides whether to grant attorneys' fees to a prevailing defendant in a Title VII case. *Christiansburg*, 434 U.S. 412. The Court explained:

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his [or her] action must have been unreasonable or without foundation. This

> kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421–22; *see also Marquart*, 26 F.3d at 848 ("[A] court may not award attorneys' fees to a prevailing Title VII defendant unless the 'court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" (second alteration in original) (quoting *Christiansburg*, 434 U.S. at 422)). The Eighth Circuit Court of Appeals has explained that this standard is designed "[t]o discourage the litigation of frivolous, unreasonable, groundless, or vexatious claims, but without discouraging the rigorous enforcement of federal rights under Title VII." *Marquart*, 26 F.3d at 849. The burden is on a prevailing defendant to prove that the plaintiff's claim was frivolous, unreasonable or groundless. *Id.* at 851–52 (citing cases).

As suggested above, a defendant need not prove that each of the plaintiff's claims was frivolous, unreasonable or groundless. *See Fox*, 131 S. Ct. at 2214. As the United States Supreme Court explained in *Fox:*

> [Section 2000e–5(k)] serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary That remains true when the plaintiff's suit also includes nonfrivolous claims. The defendant, of course, is not entitled to any fees arising from these non-frivolous charges.

> But the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed.

Id. (citations omitted). Where a plaintiff brings both frivolous and non-frivolous claims, the defendant is entitled to attorneys' fees that would not have been incurred but for the frivolous claims. *Id.* at 2216 ("[T]he dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation.").

3. Discussion

The court previously determined that the EEOC's claims were unreasonable, and, after reviewing the record and the parties' arguments, the court essentially stands by such determination. First, the court affirms its earlier conclusion that the EEOC's failure to exhaust Title VII's administrative prerequisites was unreasonable. *See* February 9, 2010 Order at 13–16. As CRST notes, the Eighth Circuit Court of Appeals "affirmed without qualification," Brief in Support of the Motion for Attorneys' Fees at 14, the court's August 19, 2009 Order dismissing 67 claims that the EEOC had not investigated and attempted to conciliate. *See CRST*, 679 F.3d at 672–77 (affirming the court's finding that "the EEOC wholly failed to satisfy its statutory pre-suit obligations"). Accordingly, the court stands by its earlier determination that "the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court."

February 9, 2010 Order at 16; *see Argo Distrib., LLC*, 555 F.3d at 469 ("The EEOC acts unreasonably in disregarding procedural requirements for suit, and attorneys' fees may be awarded."); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982) (upholding the district court's award of attorneys' fees under 42 U.S.C. § 2000e–5(k), citing the district court's finding that the "procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history ... [and] [t]he EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness" (internal quotation mark omitted)); *cf. EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 996 (8th Cir. 2006) (noting that, although it was "troubled by the EEOC's failure to adhere to its own deadline of June 20 before declaring that conciliation had failed," such failure was not unreasonable where "the parties agreed throughout negotiations that they were far apart on the terms of a settlement, and it [did] not appear that there was a reasonable prospect of settlement when the EEOC declared that conciliation efforts were unsuccessful").

Second, the court finds that the EEOC's pattern-or-practice claim was unreasonable. *See* April 30, 2009 Order at 57–67 (noting that the EEOC presented only anecdotal evidence in support of its pattern-or-practice claim, it did not present "any expert evidence, statistics or legal authority to support its argument that there is so much sexual harassment of CRST's female drivers that CRST must tolerate sexual harassment" and its "argument boils down to little more than ... bald assertions"). The remaining

claims that the court dismissed on summary judgment were likewise unreasonable or groundless.[9] In its Resistance to the Motion for Attorneys' Fees, the EEOC suggests that its position that Lead Drivers were supervisors was "sufficiently non-frivolous" that the United States Supreme Court granted certiorari on the issue of what constitutes a "supervisor." Resistance

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[9] The court notes that the August 13, 2009 Order finding that the EEOC failed to exhaust Title VII's administrative requirements only addressed the remaining 67 individuals in the suit. The court did not make a finding as to whether the EEOC reasonably investigated and attempted to conciliate the individual claims the court had already dismissed on summary judgment. On appeal, the Eighth Circuit Court of Appeals found that "the EEOC failed, as a matter of law, to investigate and/or conciliate its claims on behalf of" 4 additional individuals. *CRST*, 679 F.3d at 689. Thus, the court finds that these 71 claims were unreasonable.

In its Brief in Support of the Motion for Attorneys' Fees, CRST contends that the EEOC failed to satisfy its pre-suit obligations as to all of the claims other than the claims on behalf of Starke and Peeples. *See* Brief in Support of the Motion for Attorneys' Fees at 14 & n.7 (noting that CRST does not request fees incurred in defeating Peeples's claim). The EEOC does not respond to this contention in its Resistance to the Motion for Attorneys' Fees and, in earlier filings, it appears to concede that it did not investigate or attempt to conciliate claims other than those on behalf of Starke and Peeples. *See, e.g.*, Resistance to the Motion for an Order to Show Cause (docket no. 229) at 7 (noting that, at the time the EEOC attempted to conciliate, the only named aggrieved individuals were Starke and Peeples). To the extent the EEOC failed to reasonably investigate and conciliate any claims in addition to those identified by the court and the Eighth Circuit Court of Appeals, the court finds that such claims were unreasonable.

to the Motion for Attorneys' Fees at 18. The court disagrees. The law in the Eighth Circuit Court of Appeals was well-settled before the EEOC brought the instant action. *See CRST*, 679 F.3d at 684 ("Applying our precedent, we agree with the district court that CRST's Lead Driver is not a supervisory employee."); *see also* June 2, 2009 Order at 17 n.9 (noting that "[o]ther courts have uniformly held that truck driver trainers are coworkers and not supervisors"). Thus, given that the EEOC should have known that it would be required to prove that CRST had actual or constructive knowledge of the sexual harassment, many of its claims were groundless. For instance, the court summarily dismissed 6 individual claims because the individuals had "*never* informed CRST of the sexual harassment while they were working for CRST." June 18, 2009 Order at 7; *cf. EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197, 198 (8th Cir. 1987) (finding that the plaintiff's claim was not baseless given that the defendant had sought neither a pretrial dismissal nor summary judgment, had not moved for a directed verdict during the trial and "the district court directed the parties to submit post-trial briefs as well as proposed findings of fact and conclusions of law before taking the case under submission").

In sum, the court finds that the EEOC's pattern-or-practice claim and 153 of its individual claims were unreasonable or groundless and, consequently, the *Christiansburg* standard is satisfied as to these claims. Accordingly, the court shall turn to consider whether CRST's requested fees and expenses are reasonable.

C. Reasonable Fees and Out–of–Pocket Expenses

1. Parties' arguments

In its Brief in Support of the Motion for Attorneys' Fees, CRST argues that it is entitled to fees it incurred prior to the appeal and the fees incurred during the appeal. With regard to the fees incurred prior to the appeal, CRST contends that the court's earlier fee award remains reasonable after deducting fees incurred defending against the EEOC's claim on behalf of Starke. *See* Attachment J to the Motion for Attorneys' Fees (docket no. 386–15) (showing hours Jenner & Block ("Jenner") spent on the claim on behalf of Starke); Attachment L to the Motion for Attorneys' Fees (docket no. 386–17) (showing hours Simmons Perrine Moyer & Bergman ("Simmons") [10] spent on the claim on behalf of Starke). With regard to the fees incurred on appeal, CRST requests $1,072,014.67 if Jenner's hourly rates are used or $491,076.61 if local hourly rates are used. These figures reflect a 5% reduction for work spent on the claim on behalf of Starke. Finally, CRST requests the same out-of-pocket expenses that the court previously awarded CRST, "less the amount awarded by [the] [c]ourt for investigator fees in excess of the retainer payment

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[10] As CRST notes in the Brief in Support of the Motion for Attorneys' Fees, "Moyer & Bergman merged with Simmons Perrine to become Simmons Perrine Moyer Bergman on January 1, 2009." Brief in Support of the Motion for Attorneys' Fees at 27 n.17.

made by CRST." Brief in Support of the Motion for Attorneys' Fees at 34.

In its Resistance to the Motion for Attorneys' Fees, the EEOC advances five arguments regarding CRST's particular fee and expense requests. First, the EEOC contends that CRST is not a prevailing party as to the appeal and, even if it were, CRST has not shown that the *Christiansburg* standard is satisfied. Accordingly, the EEOC maintains that CRST is not entitled to any appellate fees. Second, the EEOC argues that CRST did not deduct all fees that relate to Starke's claim; specifically, the EEOC contends that CRST has not deducted "fees incurred in conducting legal research, writing and editing CRST's judicial estoppel summary judgment motion." Resistance to the Motion for Attorneys' Fees at 21. Third, the EEOC argues that CRST did not deduct "fees related to work on four intervening claims on which it did not prevail." *Id.* Fourth, the EEOC argues that CRST is entitled only to fees that it incurred defending against frivolous claims and "CRST's request for fees should be denied because it fails to distinguish for work that does not meet the *Christiansburg* standard." *Id.* at 22. Finally, the EEOC argues that CRST's documentation is insufficient; specifically, the EEOC alleges that CRST's invoices reflect "block billing," which "mak[es] it impossible to differentiate between the work CRST's attorneys performed on their losing motion, and work on other motions where CRST was successful." *Id.*

2. Applicable law

"'The starting point in determining [reasonable attorneys' fees] is the lodestar, which is calculated by

multiplying the number of hours reasonably expended by the reasonable hourly rates.'" *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005) (quoting *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 851 (8th Cir. 2002)). The lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir. 1993). "If the prevailing party did not achieve success on all claims, [the lodestar] may be reduced, taking into account the most critical factor, 'the degree of success obtained,' with discretion residing in the district court." *Simpson v. Merchs. & Planters Bank*, 441 F.3d 572, 580 (8th Cir. 2006) (quoting *Hensley*, 461 U.S. at 436–37).

The district court retains wide discretion in making a fee award. *See Hensley*, 461 U.S. at 437 ("We reemphasize that the district court has discretion in determining the amount of a fee award."). "This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* The district court must, however, "provide a concise but clear explanation of its reasons for the fee award." *Id.* "When an adjustment is requested on the basis of ... [the] limited nature of the relief obtained by the [prevailing party], the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.*

A reasonable hourly rate is generally the prevailing market rate in the locale—that is, the "ordinary rate for similar work in the community where the case has

been litigated." *Moysis v. DTG Datanet*, 278 F.3d 819, 828–29 (8th Cir. 2002) (quoting *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001)) (internal quotation mark omitted).

> To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). "A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate." *Id.*

The prevailing party must also proffer evidence of the number of hours reasonably expended on the litigation. *Hensley*, 461 U.S. at 433.

> Inadequate documentation may warrant a reduced fee.... Incomplete or imprecise billing records preclude any meaningful review by the district court of the fee application for "excessive, redundant, or otherwise unnecessary" hours and may make it impossible to attribute a particular attorney's specific time to a distinct issue or claim.

H.J. Inc. v. Flygt Corp., 925 F.2d 257, 260 (8th Cir. 1991) (quoting *Hensley*, 461 U.S. at 437).

"'[M]ost factors relevant to determining the amount of a fee are subsumed within the lodestar.'" *Casey*, 12 F.3d at 805 (quoting *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991)); *see Hensley*, 461 U.S. at 434 n.9 ("[I]t should [be] noted that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." (citing *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980) (en banc))). However, the court should consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See McDonald v. Armontrout*, 860 F.2d 1456, 1459 (8th Cir. 1988).

> *Johnson* called for consideration of twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 1459 n.4. "[T]he most critical factor" in determining the reasonableness of an attorneys' fee award in civil rights litigation is "the degree of success obtained." *Hensley*, 461 U.S. at 436.

When making the determination of a reasonable fee, a court should consider the party's "overall success; the necessity and usefulness of [the party's] activity in the particular matter for which fees are requested; and the efficiency with which [the party's] attorneys conducted that activity." *Jenkins v. Missouri*, 127 F.3d 709, 718 (8th Cir. 1997) (en banc). A district court need not address exhaustively every *Johnson* factor. *Emery*, 272 F.3d at 1048. The court should consider what factors, "in the context of the present case, deserve explicit consideration." *Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 997 (8th Cir. 1999). The district court should use its own knowledge, experience and expertise in determining the amount of the fee to be awarded. *Gilbert v. City of Little Rock*, 867 F.2d 1063, 1066–67 (8th Cir. 1989).

The United States Supreme Court has cautioned that "[t]he determination of fees 'should not result in a second major litigation.'" *Fox*, 131 S. Ct. at 2216 (quoting *Hensley*, 461 U.S. at 437). Thus, while district courts must apply the correct standards, they

> need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.

Id.; *see also Kline v. City of Kan. City, Mo., Fire Dep't*, 245 F.3d 707, 709 (8th Cir. 2001) (upholding the district court's "reasonable estimate" of the plaintiff's attorneys' fees).

3. Discussion

The court shall first determine whether CRST's requested attorneys' fees are reasonable and shall then turn to consider whether CRST is entitled to its requested out-of-pocket expenses.

a. Attorneys' fees

i. Prior to appeal

In its February 9, 2010 Order, the court calculated a lodestar amount of $3,501,394.63 for Jenner's services and a lodestar amount of $502,977.02 for Simmons's services, yielding a total of $4,004,371.65 in attorneys' fees. February 9, 2010 Order at 19–30. The court finds that this prior fee award is a useful starting point. Pursuant to *Fox*, CRST is entitled only to those fees it would not have incurred but for the frivolous, unreasonable or groundless claims. *See Fox*, 131 S. Ct. at 2215. As outlined above, the court finds that the EEOC's pattern-or-practice claim and 153 of its individual claims were unreasonable or groundless. After a review of the record and for the reasons set forth below, the court concludes that $3,724,065.63 is a reasonable estimate of the attorneys' fees incurred solely as a result of those claims.

First, the court reaches this figure by deducting 7% of the original fee award, or $280,306.02. In other words, the court estimates that, had the EEOC not asserted the unreasonable or groundless claims, CRST would still have incurred $280,306.02 in attorneys' fees in defending against the Starke claim and the 101 claims on which CRST did not obtain a judicial

determination on the merits.[11] The court finds that this is a more accurate estimate than the $35,799.73 CRST proposes. *See* Brief in Support of the Motion for Attorneys' Fees at 25, 28 (alleging that Jenner and Simmons spent a combined 147 hours on Starke's claim, for a total of $30,799.73); CRST's Reply at 20 (suggesting that the court deduct an additional $5,000 to reflect time spent researching and drafting the judicial estoppel summary judgment brief). Specifically, the court finds that CRST's proposal fails to take into account the work that Jenner and Simmons would have had to do absent the unreasonable or groundless claims—for example, the time spent drafting an answer and on general case management. *See Fox*, 131 S. Ct. at 2215. The court need not comb through the record to itemize the fees CRST would have incurred absent the unreasonable or groundless claims; rather, the court finds that, in light of its familiarity with the case, 7% is a reasonable estimate. *See id.* at 2216 ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection."); *see also Kline*, 245 F.3d at 709 (upholding the district court's estimate, which included a 15% deduction for "overlawerying" and a 40% reduction to reflect the plaintiffs' "limited degree of success").

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[11] The 101 claims on which CRST did not obtain a judicial determination on the merits include the 98 claims dismissed as a discovery sanction and 3 of the claims that the EEOC voluntarily withdrew. *See supra* note 6. The court estimates that 5% of the original fee award was incurred in defending against the EEOC's claim on behalf of Starke and 2% of the original fee award was incurred in defending against the 101 claims on which CRST did not obtain a judicial determination on the merits.

Second, the court finds that $3,724,065.63 is reasonable in light of the *Johnson* factors. This was a large and complicated case that involved voluminous discovery and multiple motions for summary judgment. The EEOC further complicated the case by creating confusion as to whether it asserted a pattern-or-practice claim, requiring CRST to not only defend against the individual claims but also a perceived pattern-or-practice claim. Moreover, CRST was largely successful in its efforts. Accordingly, after considering the *Johnson* factors, the court finds that $3,724,065.63 is a reasonable award for the fees CRST incurred pre-appeal.

Finally, the court rejects the EEOC's arguments that CRST's request includes fees incurred in defending against interveners' claims and "fees for work that does not meet the *Christiansburg* standard," Resistance to the Motion for Attorneys' Fees at 22, and that CRST did not provide sufficient documentation. The EEOC does not identify any specific billing entry that it contests, its suggestion that CRST included fees incurred in defending against interveners' claims is unsupported and the court finds that CRST's documentation is sufficient.

Thus, in light of the foregoing, the court concludes that CRST is entitled to $3,724,065.63 in attorneys' fees incurred pre-appeal.

ii. Appeal

The court must now consider the reasonable amount of attorneys' fees incurred during the appeal proceedings. The court begins by calculating the

lodestar amount—that is, the reasonable hourly rate multiplied by the reasonable hours spent. First, with regard to the reasonable hourly rate, the court finds that, for the reasons set forth in its February 9, 2010 Order, it is appropriate to reduce the rates charged by Jenner's attorneys and personnel to levels comparable to that of the Simmons attorneys. *See* February 9, 2010 Order at 21–24 (finding Jenner's hourly rates unreasonable in light of the prevailing rates for similar work in the community). Although CRST contends that the court should apply Jenner's hourly rates for the work performed on appeal in light of the "EEOC's all-out effort to reverse this [c]ourt's decisions, ... [the] EEOC's use of its appellate specialists to prepare its briefs and argue its case ... [and] the invaluable appellate skill and experience" that Jenner's attorneys contributed, Brief in Support of the Motion for Attorneys' Fees at 31, the court is not persuaded that CRST has satisfied its burden of demonstrating that the circumstances warrant a departure from the general practice of computing a reasonable hourly rate based on the local community. *See Blum*, 465 U.S. at 895 n.11.

Second, with regard to the reasonable hours spent, the court finds that CRST's requested hours, as set forth in the table below, are largely reasonable and supported by sufficient documentation. Significantly, the EEOC does not object to the specific number of hours spent on this case by CRST's counsel. Moreover, the court notes that this case, even at the appellate stage, was exceptionally large and complex. The EEOC

appealed 107 claims, 106 of which the court has found were unreasonable.

The court, however, rejects CRST's proposal of deducting 5% of the total claimed appellate fees to reflect hours spent on the EEOC's claim on behalf of Starke. Pursuant to *Fox*, CRST is entitled only to those fees it would not have incurred but for the frivolous, unreasonable or groundless claims. *See Fox*, 131 S. Ct. at 2215. The court finds that a conservative estimate of $51,692.28, or 10% of the total claimed appellate fees, reasonably reflects the attorneys' fees that CRST would have incurred absent the unreasonable or groundless claims. *See id.* at 2216 ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection."); *see also Kline*, 245 F.3d at 709 (upholding the district court's estimate, which included a 15% deduction for "overlawerying" and a 40% reduction to reflect the plaintiffs' "limited degree of success")

Thus, the court calculates the lodestar amount, and the amount the court finds reasonable under the *Johnson* factors, as $465,230.47, as set forth in the following table:

Attorney	Hours	Reasonable Rate	Award
John H. Mathias (partner)	247.50	$315	$77,962.50
Barry Levenstam (partner)	1.75	$315	$551.25
Robert T. Markowski (partner)	163.25	$315	$51,423.75

James T. Malysiak (partner)	548.00	$315	$172,620.00
Sally K. Sears Coder (partner)	34.75	$315	$10,946.25
Richard P. Campbell (of counsel)	11.50	$315	$3,622.50
Emma J. Sullivan (of counsel)	106.25	$185	$19,656.25
J. Andrew Hirth (associate)	42.00	$185	$7,770.00
Ashley M. Schumacher (associate)	304.50	$185	$56,332.50
Michele L. Slachetka (associate)	278.00	$185	$51,430.00
David P. Saunders (associate)	23.50	$185	$4,347.50
Eric J. Schwab (associate)	14.25	$185	$2,636.25
Benjamin J. Wimmer (associate)	24.00	$185	$4,440.00
Sapna G. Lalmalani (associate)	38.50	$185	$7,122.50
Christine M. Bowman (associate)	8.00	$185	$1,480.00
Cheryl J. Kras (paralegal)	105.75	$125	$13,218.75
Legal assistants	50.00	$125	$6,250.00
Kevin J. Visser	83.20	2009–$301.52 2010–$315 2011–$325 2012–$335	$25,112.75
SUBTOTAL	2,084.70		$516,922.75

Minus the 10% reduction for attorneys' fees spent on the EEOC's claim on behalf of Starke	-$51,692.28
TOTAL	$465,230.47

Finally, the court rejects the EEOC's arguments regarding CRST's requested appellate fees. Specifically, the court has already found that CRST is the prevailing party and that the *Christiansburg* standard is satisfied as to all of the claims that the EEOC appealed, other than the claim on behalf of Starke. Moreover, the court finds that CRST provided sufficient documentation and, as discussed above, the court finds that $465,230.47 reflects the total appellate fees that CRST would not have incurred but for the EEOC's unreasonable or groundless claims.

Thus, in light of the foregoing, the court concludes that CRST is entitled to $465,230.47 in attorneys' fees incurred on appeal.

b. Out-of-pocket expenses

In its February 9, 2010 Order, the court found that CRST was entitled to $463,071.25 in out-of-pocket expenses. *See* February 9, 2010 Order at 30–38. In its Brief in Support of the Motion for Attorneys' Fees, CRST "requests that the [c]ourt again award these expenses less the amount awarded by [the] [c]ourt for investigator fees in excess of the retainer payment made by CRST." Brief in Support of the Motion for Attorneys' Fees at 34. The EEOC does not dispute any specific expense. Accordingly, after reviewing the record and for the reasons set forth in its February 9,

2010 Order, the court finds that CRST is entitled to the following:

Expense	Amount awarded
Long distance telephone expenses	$176.17
Messenger and overnight delivery expenses	$5,127.86
Fees for investigators	$12,500.00
Expert witness fees	$242,212.22
Postage	$49.84
Travel and related expenses	$34,135.94
Printing and copying costs	$119,185.55
TOTAL	$413,387.58

c. Summary

Thus, consistent with the foregoing, the court finds that CRST is entitled to $3,724,065.63 in attorneys' fees incurred pre-appeal, $465,230.47 for attorneys' fees incurred as a result of the appeal and $413,387.58 in out-of-pocket expenses, for a total of $4,602,683.68.

IV. BILL OF COSTS

In its Bill of Costs filed pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920, CRST requests that the court tax costs in its favor in the amount of $91,758.46. Specifically, "CRST seeks to recover the same taxable costs that were allowed by the Clerk [of Court] on CRST's first bill of costs minus the costs incurred for ... Starke and Rolf Starke's depositions." Brief in Support of the Motion for Attorneys' Fees at 33. The EEOC does not contest any specific cost; rather, the EEOC argues that CRST is not entitled to costs because it is not the "prevailing

party" within the meaning of Rule 54(d). The EEOC contends that the February 11, 2013 Judgment does not indicate that CRST prevailed, and, to the contrary, the EEOC contends that it is now the prevailing party.

Rule 54(d)gives district courts the power to tax "costs" to a prevailing party and 28 U.S.C. § 1920 defines "costs." *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440–42 (1987). In the context of awarding costs under Rule 54(d), the Eighth Circuit Court of Appeals has held that a "prevailing party" is the party "in whose favor a judgment is rendered." *Firefighters' Inst. for Racial Equality v. City of St. Louis*, 220 F.3d 898, 905 (8th Cir. 2000) (quoting Black's Law Dictionary 1145 (7th ed. 1999)) (internal quotation mark omitted). A party need not, however, have succeeded on every claim to qualify as a prevailing party. *See Hillside Enters. v. Carlisle Corp.*, 69 F.3d 1410, 1416 (8th Cir. 1995) (upholding the district court's award of costs to a party because the party had "won a larger judgment" and, therefore, could "logically be considered the prevailing party" under Rule 54(d)); *Shum v. Intel Corp.*, 629 F.3d 1360, 1367–68 (Fed. Cir. 2010) ("A party is not required ... to prevail on all claims in order to qualify as a prevailing party under Rule 54."); *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 835 (6th Cir. 2005) ("A party is the prevailing party under Rule 54(d) even when it is only partially successful."); *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990) (noting that the case presented "a situation where both parties ... 'prevailed' on at least one claim" but finding that the district court did not abuse its discretion in awarding costs to the

party "that prevailed on the vast majority of issues"). In the case of a mixed judgment, the district court may, in its discretion, award costs to the party that had the relatively greater success. *Hillside Enters.*, 69 F.3d at 1416.

In this case, the court has already rejected the EEOC's suggestion that this case is comprised of a single claim and the court has already determined that, for purposes of 42 U.S.C. § 2000e–5(k), CRST is the prevailing party as to the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims. The court finds that CRST is also the prevailing party for purposes of taxing costs under Rule 54(d) and 28 U.S.C. § 1920. The October 1, 2009 Judgment was undoubtedly in CRST's favor. *See* October 1, 2009 Judgment at 1 (stating that the EEOC "takes nothing"). On appeal, the Eighth Circuit Court of Appeals largely affirmed the October 1, 2009 Judgment, remanding only as to the claims on behalf of Starke and Jones. *See CRST*, 679 F.3d at 695. Thus, because CRST "prevailed on the vast majority of issues," *Roberts*, 921 F.2d at 1058, the court concludes that CRST is the prevailing party for purposes of taxing costs. Moreover, the court notes that CRST has modified its original bill of costs to reflect that it did not prevail on the EEOC's claim on behalf of Starke. With regard to the claim on behalf of Jones, the court finds no reason to reduce CRST's costs in light of the fact that the EEOC withdrew the claim on behalf of Jones under "the law of the case." Notice of Withdrawal of Claim for Tillie Jones at 1; *see also Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037–38 (8th Cir. 2001) ("We do not read Rule 54(d)(1) as impairing the

inherent authority of a trial court to award costs incurred in defending an action prior to its voluntary dismissal by the plaintiff, even though a voluntary dismissal without prejudice means that neither party can be said to have prevailed.").

Thus, the court finds it appropriate to tax CRST's requested costs in its favor. The EEOC does not dispute any specific cost and the court has previously found such costs to be reasonable and authorized under 28 U.S.C. § 1920. *See* Taxation of Costs Memorandum (docket no. 303); February 9, 2010 Order at 6–12. Accordingly, costs shall be taxed in the amount of $87,323.95 for transcript fees and $4,434.51 for fees for witnesses, for a total of $91,758.46.

V. CONCLUSION

In light of the foregoing, it is **HEREBY ORDERED THAT:**

(1) Costs in the amount of **$91,758.46** are taxed in favor of CRST, pursuant to 28 U.S.C. § 1920;

(2) CRST's Motion for Attorneys' Fees (docket no. 386) is **GRANTED IN PART** and **DENIED IN PART** as follows:

(a) The EEOC is **ORDERED** to pay CRST **$4,189,296.10** in attorneys' fees; and

(b) The EEOC is **ORDERED** to pay CRST **$413,387.58** in out-of-pocket expenses;

(3) The Clerk of Court is **DIRECTED** to **ENTER JUDGMENT** in favor of CRST in the

amount of **$4,694,442.14.** This figure includes attorneys' fees, expenses and the costs taxed in favor of CRST pursuant to 28 U.S.C. § 1920; and

(4) The Clerk of Court is **DIRECTED** to **CLOSE THIS CASE.**

IT IS SO ORDERED.

Appendix C

United States Court of Appeals
Eighth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff–Appellant,
Janet Boot, Intervenor Plaintiff,
Remcey Jeunenne Peeples; Monika Starke, Intervenor Plaintiffs–Appellants,

v.

CRST VAN EXPEDITED, INC.,
Defendant–Appellee.
Equal Employment Advisory Council; Chamber of Commerce of the United States; Society for Human Resource Management; National Federation of Independent Business Small Business Legal Center,
Amici on Behalf of Appellee.

Nos. 09–3764, 09–3765, 10–1682.
Submitted: May 7, 2012.
Filed: May 8, 2012.

Before MURPHY, SMITH, and BENTON, Circuit Judges.

SMITH, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) filed suit in its own name against CRST Van Expedited, Inc. (CRST), alleging that CRST subjected Monika Starke "and approximately 270 similarly

situated female employees" to a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Starke and Remcey Jeunenne Peeples intervened in the EEOC-instituted action and individually pursued their respective hostile work-environment claims against CRST, as well as claims for unlawful retaliation under Title VII and Iowa state law.

The district court ruled in CRST's favor on a series of dispositive motions that collectively disposed of the entire action. The district court also awarded CRST $92,842.21 in costs and $4,467,442.90 in attorneys' fees and expenses, pursuant to 42 U.S.C. § 2000e–5(k) and 28 U.S.C. § 1920, as a sanction for the EEOC's failure to reasonably investigate and conciliate in good faith its claims against CRST.

As set out below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

This consolidated appeal concerns a sweeping employment-discrimination suit that the EEOC instituted against CRST, one of the country's largest interstate trucking companies. The EEOC alleged that CRST was responsible for severe and pervasive sexual harassment in its New–Driver Training Program ("Training Program"). Because "we are reviewing the district court's grant of summary judgment against [EEOC, Starke, and Peeples], we recite the facts in the light most favorable to [them]." *Bonn v. City of Omaha*, 623 F.3d 587, 589 (8th Cir. 2010).

A. CRST's Business Model and Training Program

CRST is an interstate logistics and transit company that employs more than 2,500 long-haul drivers. CRST's business model relies on an efficiency measure known as "Team Driving." CRST operates the trucking industry's largest fleet of team-driven tractor trailers. Specifically, CRST assigns two drivers to a truck who alternate between driving and sleeping on-board in the truck's sleeper cab for as much as 21 days in order to maximize mileage and minimize stops.

Newly hired drivers must successfully complete CRST's Training Program before CRST permits them to drive full time for full pay as certified CRST drivers. The Training Program commences with a three-and-a-half day classroom component ("New–Driver Orientation") to orient the new drivers with CRST's methods and policies.

During new-driver orientation, CRST distributes to each trainee its "Professional Driver's Handbook" ("Driver Handbook"), which contains an entire section devoted to its anti-harassment policy, as well as the procedures for reporting such harassment. Additionally, CRST orientation leaders orally reiterate CRST's written anti-harassment policy, explain to trainees how they can report harassment complaints, and present a video stressing that CRST will not tolerate sexual harassment. The Driver Handbook expressly forbids sexual harassment, as well as any form of retaliation against complainants of sexual harassment. It also instructs employees who endure or witness harassment or discrimination to immediately

report the conduct to either an immediate supervisor or the Director of Human Resources. The Driver Handbook states that "[a]ll reports of harassment and/or discrimination will be handled in a confidential manner." CRST's charges its Human Resources Department (H.R.) with enforcing this anti-harassment policy. At New–Driver Orientation's conclusion, CRST has each trainee sign a written "Acknowledgment and Pledge Concerning Harassment and Discrimination," attesting to the facts that the trainee "received and read [CRST's] Policy Against Unlawful Harassment and Discrimination."

Following orientation, each trainee embarks on a 28–day, over-the-road training trip with an experienced, "Lead Driver," who familiarizes the trainee with CRST's Team Driving model and evaluates the trainee's performance on this maiden haul. At the conclusion of the trainee's 28–day training trip, the trainee's Lead Driver gives the trainee "a pass/fail driving evaluation" that superiors consider when determining whether to certify the trainee as a full-fledged CRST driver. But, under CRST's organizational structure, Lead Drivers lack the authority to hire, fire, promote, demote, or reassign trainees; CRST's Safety and Operations Departments make all final decisions concerning the trainees' employment. Still, in a responsive letter to the EEOC correspondence, H.R. Director James Barnes later described the Lead Driver-trainee relationship as "really no different than the role of supervisors in other industries and organizations."

B. CRST's Channels for Reporting Sexual Harassment

CRST accorded its trainees and team drivers multiple channels for reporting sexual harassment. Those channels included (1) CRST's "open-door policy," which encouraged all of its employees to approach their supervisors, any employee in the Operations or Safety Departments, or any manager about any issue; (2) toll-free phone numbers for fleet managers who were available around the clock; (3) Qualcomm, a device placed in every truck that transmits messages, similar to emails, directly to fleet managers; (4) H.R.'s nationwide toll-free number and local toll phone number, both of which CRST provided in the Driver Handbook's section on how to properly report sexual harassment; and (5) evaluation forms given to all trainees at the training trip's conclusion soliciting each trainee's feedback concerning his or her lead driver.[1]

C. Starke's Initiating Charge

On December 1, 2005, Starke filed a charge of discrimination with the EEOC. Therein, Starke alleged that CRST "discriminated against [her] on the basis of [her] sex (female) in that [she] was subjected to sexual harassment, in violation of Title VII of the Civil Rights

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[1] In April 2007, CRST added "ReportLine," an independently administered, toll-free hotline that employees may call to report, openly or anonymously, any illegal or improper conduct; ReportLine forwards all personnel-related complaints to H.R. for further review. Because the majority of the alleged harassment predates ReportLine's inception, it is of limited relevance.

Act of 1964, as amended." In the "Particulars" section of the charge form, Starke stated:

> I was hired by the [CRST] on June 22, 2005[,] in the position of Truck Driver. Since my employment began with the Respondent I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. "You got big tits for your size, etc...[.]" I informed Bob Smith that I was not interested in a sexual relationship with him. On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 [,] through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

Upon receiving Starke's Charge, the EEOC notified CRST of the filing and instructed CRST to respond, on or before December 30, 2005, with "a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate." The EEOC advised CRST to "include any additional information and explanation [it] deem [ed] relevant to the [Charge]." The EEOC sent CRST a corresponding, initial "request for information" asking that CRST "submit information and records relevant to the [charge]." The EEOC

assured CRST that "[t]he following dates are considered to be the 'relevant period' for the attached [r]equest for [i]nformation: January 2, 2005–November 2, 2005." The EEOC's initial request for information primarily concerned Starke's alleged harassment and did not seek information relating to other potential victims.

On December 21, 2005, CRST submitted its "position statement" to the EEOC and furnished the EEOC with all of the information that the EEOC demanded in the request for information. In its position statement, CRST denied discriminating against or harassing Starke. The company based this denial on its own internal investigation into Starke's claims against Lead Drivers Smith and Goodman. [2] CRST also disclosed the identity of two other female drivers, Lori

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[2] Specifically, CRST contended that it interviewed eyewitnesses and the alleged wrongdoers themselves about the matter. With respect to Smith, CRST interviewed Frank Taylor, an eyewitness to some of the alleged harassment, who confirmed that Smith made inappropriate remarks to Starke. Taylor stated that he admonished Starke to abstain from driving with Smith on her training trip if she felt uncomfortable, but that Starke continued driving with Smith anyway. For his part, Smith admitted to uttering inappropriate comments, but he maintained that "nothing physical" transpired between Starke and himself. Regarding Goodman, H.R. discovered that, on August 3, 2005, Starke reported on her evaluation form that Goodman had treated her "very well." When CRST confronted Goodman about Starke's allegations, Goodman acknowledged having a sexual relationship with Starke but averred that it was consensual. Goodman's co-driver, Timothy Walker, corroborated Goodman's account that the relationship was consensual, asserting that he overheard four "love messages" that Starke had left on Goodman's voicemail.

Essig and Tamara Thiel, who, like Starke, had filed formal charges of discrimination with the EEOC against CRST.

D. The EEOC's Investigation and Reasonable Cause Determination

In the months that followed, the EEOC sent multiple supplemental requests for information to CRST. Over the course of the investigation, the EEOC learned that, in addition to Starke, Essig, and Thiel, female drivers Rhonda Morgan and Peeples had also filed discrimination charges against CRST for alleged sexual harassment. On July 28, 2006, the EEOC submitted a third supplemental Request for Information to CRST. This third request for information asked that CRST furnish "a copy of all other [c]harges of [d]iscrimination that CRST has received in the past five years from any government agency that alleges sexual harassment." Additionally, the EEOC demanded "the name, gender, home address, and home telephone number of all employees that were trained by either [Smith] and/or [Goodman]," including "the dates of the training and documentation of any complaints made against these two trainers by any of these trainees."

On March 22, 2007, the EEOC presented CRST with a fourth supplemental request for information seeking detailed contact information for all of its dispatchers who worked during a complaint-relevant time and for female drivers that began working after January 1, 2005.

On July 12, 2007, the EEOC presented CRST with its "Letter of Determination," which (1) notified CRST that the EEOC had found reasonable cause to believe that CRST subjected Starke and "a class of employees" to sexual harassment on the basis of gender and (2) offered to conciliate the claim.

E. The EEOC's and CRST's Conciliation

On August 6 and August 7, 2007, CRST counsel Thomas D. Wolle contacted EEOC Investigator Pamela Bloomer to confirm CRST's desire to conciliate with the EEOC. On August 8, 2007, Bloomer left Wolle a voicemail message asking Wolle to send CRST's conciliation proposal by August 16, 2007. Wolle responded that he preferred that the EEOC initiate the proposal process.

On August 17, 2007, Wolle and Bloomer held a telephone conversation during which Bloomer told Wolle that the EEOC would require CRST to send a letter to past and present employees to help identify class members who might be part of a settlement. On August 24, 2007, Wolle telephoned Bloomer to inform her that he had spoken with Starke's counsel and that, from that conversation, CRST had determined that conciliation appeared futile. Wolle promised to send an email confirming CRST's position regarding the futility of conciliation. Bloomer responded that "the next step after conciliation would be [the] EEOC's internal decision whether to litigate on behalf of [Starke] and the class or provide [Starke] with a [right-to-sue] letter."

The parties could reach no agreement on conciliation and, on August 28, 2007, the EEOC notified CRST that the EEOC had "determined that its efforts to conciliate [the Charge] as required by [Title VII] have been unsuccessful." The EEOC added that because "further conciliation efforts would be futile or non-productive," it would "not make further efforts to conciliate [the Charge]" and was "forwarding the case to [its] legal unit for possible litigation."

F. The Instant Lawsuit

On September 27, 2007, the EEOC filed the instant lawsuit seeking redress for the discrimination that Starke "and a class of similarly situated female employees of [CRST]" allegedly endured. The EEOC brought the suit in its own name, pursuant to § 706 of Title VII, 42 U.S.C. § 2000e–5, "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." The amended complaint alleged, in pertinent part, as follows:

> 7. ... two of [CRST's] [L]ead [D]rivers subjected Starke to sexual harassment during their supervision of Starke (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions of sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its [L]ead [D]rivers and

> because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.
>
> 8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST....
>
> 9. The effect of the practices complained of in Paragraphs 7 and 8 has been to deprive Starke and a class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

The EEOC alleged that CRST perpetrated these actions intentionally and "with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees."

In its prayer for relief, the EEOC sought (1) "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment, [and] any other employment practice which discriminates on the basis of sex"; (2) an order compelling "CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices"; (3) a "make[-]whole" order awarding Starke and the class backpay and benefits

with prejudgment interest; (4) an order awarding Starke and the class compensatory damages and punitive damages; and (5) an order awarding the EEOC the costs of this action.

From September 27, 2007, the date that the EEOC filed suit, until nearly two years thereafter, the EEOC did not identify the women comprising the putative class despite the district court's and CRST's repeated requests to do so. According to the district court, "it was unclear whether the instant Section 706 lawsuit involved two, twenty or two thousand 'allegedly aggrieved persons.'" *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 2524402, at *8 (N.D. Iowa Aug. 13, 2009) (quoting 42 U.S.C. § 2000e–5(f)(1)). The district court concluded that "the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief," but "[i]nstead ... was using discovery to find them."[3] *Id.* at *9.

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[3] The district court supported this conclusion with the following chronology of discovery in the case:

> On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

On August 8, 2008, CRST asked the court to establish a date "by which the EEOC completes its identification of class members." Response (docket no. 38), at 4. The EEOC responded that it had identified "a total of 49 class members so far," predicted the "total class will reach between 100 and 150 individuals," indicated it believed it could identify "the bulk of the class members" by October 15, 2008, and suggested a December 7, 2008 deadline for identifying the "class members." Reply (docket no. 42), at 1–3.

On August 20, 2008, the court set a[n] October 15, 2008 deadline for the EEOC "to disclose the identit[ies] of class members." The court also continued the parties' previously agreed-upon discovery deadline to January 15, 2009.

By October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved persons to CRST. The number of "class members" greatly increased in the ten days immediately preceding the deadline. Prior to October 7, 2008, the EEOC had identified only seventy-nine "class members" to CRST. On October 7, 2008, the EEOC identified 40 new "class members" and advised CRST that the "[i]nvestigation is continuing." Seventh Supplement to Initial Disclosures (docket no. 243–5), at 1. On October 15, 2008, the EEOC identified 119 more "class members" and again advised CRST that the "[i]nvestigation is continuing." Eighth Supplement to Initial Disclosures (docket no. 243–6) at 1; Ninth Supplement to Initial Disclosures (docket no. 243–7), at 1; Tenth Supplement to Initial Disclosures (docket no. 243–8), at 1. Also on October 15, 2008, the EEOC partially identified 66 additional persons and stated [that] "the EEOC expects [that] all [of] these individuals are class members...." Eleventh Supplement to Initial Disclosures (docket no. 243–9), at 1. Again, the EEOC stated that the "[i]nvestigation is continuing." *Id.* at 1.

The district court issued two orders to the EEOC, compelling the agency to (1) immediately amend its list of 270 women as soon as it learn of any women whose claims it no longer wished to pursue and (2) make all

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> The total number of allegedly aggrieved persons identified or partially identified by the EEOC by October 15, 2008[,] was much greater than CRST had anticipated based upon the EEOC's prior representations to the court. *See, e.g.*, Response (docket no. 42), at 1–2 (EEOC estimates "the total class will reach between 100 and 150 individuals"); Scheduling Order at 2 (EEOC estimates a twenty-day trial). Therefore, on November 6, 2008, CRST filed a "Motion under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members." Motion to Show Cause (docket no. 56). CRST alleged that the EEOC did not have a good-faith basis for naming so many allegedly aggrieved persons; CRST accused the EEOC of adopting a policy of "naming everyone and asking questions later" just before the October 15, 2008 deadline. Brief in Support of Motion to Show Cause (docket no. 56–2), at 10. CRST alleged that the EEOC had simply added a large number of names found in CRST's human resources files without ever speaking to those individuals. Further, the EEOC had indicated to CRST that it reserved unto itself the option in the future "to remove some women from this list at a later date." *Id.* at 11.
>
> ... The court took the EEOC at its word that it had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination.... The court expressed concern, however, that "CRST [still] might unfairly face a 'moving target' of prospective plaintiffs as discovery winds down and trial approaches." Order (docket no. 66), at 8.

Id. at *9–10 (footnote omitted and alterations added, in part).

women on whose behalf it sought relief available to CRST for deposition. *Id.* at *10. The district court warned the EEOC that its failure to present any women for deposition before discovery's conclusion on January 15, 2009, would result in a "discovery sanction" forbidding that woman from testifying at trial and barring the EEOC from seeking relief on her behalf in the case. *Id.* As authority for this order, the district court "invoked its inherent case [-]management authority" under, *inter alia*, Federal Rules of Civil Procedure 26(f) and 16(b). *Id.* Thereafter, the EEOC made 150 of the 270 women available for deposition, prompting the district court to honor its prior order by precluding the EEOC from pursuing relief for the remaining 120 women. *Id.* at *11.

The district court, in a series of five orders, dismissed the EEOC's claims relating to over half of these 150 women. We recite only the dismissals that the EEOC currently appeals. In all, the EEOC appeals the district court's dismissal of its claims as to 107 women. First, on May 13, 2009, the district court granted CRST summary judgment against three women,[4] including Starke, reasoning that the women were judicially estopped from prosecuting their claims. *EEOC v. CRST Van Expedited, Inc.*, 614 F. Supp. 2d 968 (N.D. Iowa 2009). The court applied judicial estoppel because each woman failed to disclose on her bankruptcy petition her involvement or potential involvement in the instant lawsuit. *Id.* at 973–76. As part of this first order, the district court also judicially

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[4] Starke, Christina Payne, and Robin Timmons.

estopped the EEOC from seeking redress for the three women's alleged harassment. *Id.* at 976–77. Second, on June 2, 2009, the district court granted CRST summary judgment, on the merits, as to Peeples because she (1) failed to report her alleged harassment to CRST in a timely manner and (2) failed to create a genuine issue of material fact as to all of the essential elements of her retaliatory-discharge claim. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 1586193 (N.D. Iowa June 2, 2009). Third, on June 18, 2009, the district court granted CRST global summary judgment as to the EEOC's claims on behalf of 11 women[5] and partial summary judgment as to the EEOC's claims on behalf of 8 others;[6] the district court premised these rulings on either the individual claimants' failure to timely report alleged sexual harassment or CRST's prompt and effective response to the reports that it actually received. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 1783495 (N.D. Iowa June 18, 2009). Fourth, on July 6, 2009, the district court granted CRST summary judgment as to the EEOC's claims on behalf of three women[7] because the alleged harassment was not sufficiently severe or

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[5] Bonnie Batyik, Bethany Broeker, Kim Chisholm, Samantha Cunningham, Denise Desonier, Maybi Fernandez–Fabre, Ginger Laudermilk, Verona McIver, Faith Shadden, Rachel Tucker, and Diana Vance.

[6] Pamela Barlow, Peggy Blake, Donna Dickson, Nicole Edwards, Zelestine Grant, Martha Griffin, Carole Pettit, and Rhonda Wellman.

[7] Victoria Holmes, January Jackson, and Tillie Jones.

pervasive. Fifth, on July 9, 2009, the district court granted CRST summary judgment as to the EEOC's claims on behalf of, *inter alia*, 25 women[8] for their failure to timely report alleged harassment and/or the lack of severity or pervasiveness of the alleged harassment. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 2068386 (N.D. Iowa July 9, 2009).

Finally, on August 13, 2009, the district court barred the EEOC from seeking relief for the remaining 67 women after concluding that the EEOC had failed to conduct a reasonable investigation and *bona fide* conciliation of these claims—statutory conditions precedent to instituting suit. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009). Having disposed of all the allegedly aggrieved women in the EEOC's putative "class," the district court dismissed the EEOC's complaint.

We now consider three consolidated appeals: (1) Starke's and Peeples's joint appeal,[9] in which Starke appeals the summary judgment of her case on judicial

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[8] Antoinette Baldwin, Mary Beaton, Catherine Coronado, Dorothy Dockery, Catherine (Granofsky)–Fletcher, Debra Hindes, Tracy Hughes, January Jackson, Patricia Marzett, Virginia Mason, Lucinda McBlair, Bonnie Moesch, Sherry O'Donnell, Christina Payne, Tammi Pile, Sharon Pinchem, Peggy Pratt, Danette Quintanilla, Kathleen Seymour, Jonne Shepler, Linda Skaggs, Mary "Emily" Smith, Jennifer Susson, Robin Timmons, and Betsy Ybarra.

[9] Appeal No. 09–3764.

estoppel grounds and additionally joins Peeples in appealing summary judgment on the merits; (2) the EEOC's first numbered appeal,[10] consolidated with Starke's and Peeples's, in which the EEOC appeals the district court's multiple dispositive rulings that we recounted above; and (3) the EEOC's second numbered appeal,[11] in which it challenges the district court's award of attorneys' fees.

II. Discussion

A. EEOC's Investigation and Conciliation

In its first point on appeal, the EEOC urges that we reverse the district court's decision to bar the EEOC from pursuing claims as to 67 women based on its failure to reasonably investigate or good-faith conciliate. We hold that the district court did not err in dismissing the EEOC's claims as to 67 women for its failure to investigate and conciliate them.

1. Overview of Title VII's Pre-suit Requirements

Section 706 of Title VII, the provision under which the EEOC sued, authorizes the EEOC to bring suit in its own name, on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e–5(f)(1); *accord Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) ("Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the

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[10] Appeal No. 09–3765.

[11] Appeal No. 10–1682.

remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."). However, "[a]s originally enacted[,] Title VII did not empower the [EEOC] to sue employers to enforce the Act." *EEOC v. Hickey–Mitchell Co.*, 507 F.2d 944, 947 (8th Cir. 1974) (citing Act of July 2, 1964, Pub. L. 88–352, tit. VII, 78 Stat. 253).

> Rather, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equality of employment opportunities. Voluntary compliance proved elusive, however, as more than half of the EEOC's conciliation efforts were deemed unsuccessful. Consequently, Congress enacted the Equal Employment Opportunity Act of 1972 which amended Title VII to permit the EEOC suits. The statutory mandate that the EEOC attempt conciliation was not abandoned, however, and the Act expressly conditions the EEOC's power of suit on its inability to "secure from the respondent a conciliation agreement acceptable to the EEOC."

Id. (internal footnotes omitted); *accord Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977).

Thus, "[i]n the Equal Employment Opportunity Act of 1972, Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co.*, 432 U.S. at 359, 97 S. Ct. 2447

(internal footnote omitted). First, an employee files with the EEOC a charge "alleging that an employer has engaged in an unlawful employment practice." *Id.* Second, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Id.* If reasonable cause does exist, the EEOC moves to the third step, which attempts to remedy the objectionable employment practice through the informal, nonjudicial means " 'of conference, conciliation, and persuasion.'" *Id.* (quoting 42 U.S.C. § 2000e–5(b)). However, if unsuccessful, the EEOC may move to the fourth and final step and bring a civil action to redress the charge. *Id.* at 359–60, 97 S. Ct. 2447 (quoting 42 U.S.C. § 2000e–5(f)(1)).

As we have recognized, the EEOC's "'power of suit and administrative process [are not] unrelated activities, [but] *sequential steps in a unified scheme* for securing compliance with Title VII.'" *Hickey–Mitchell Co.*, 507 F.2d at 948 (alterations in original) (emphasis added) (quoting *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974)); *accord EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981).

2. Adequacy of the EEOC's Investigation and Conciliation

The district court barred the EEOC from pursuing claims as to 67 women based on its conclusion that "the EEOC did not investigate, issue a reasonable cause determination or conciliate the claims." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19. On appeal, the EEOC avers that the district court wrongly concluded that the EEOC's investigation, resulting

reasonable-cause determination, and conciliation were insufficient to satisfy § 706. It argues that the district court (1) misconstrued the EEOC's efforts through serial requests for information to investigate discrimination suffered by persons other than Starke; and (2) incorrectly assumed that the "EEOC had to investigate, issue a cause finding [regarding], and conciliate each individual instance of CRST's failure to respond appropriately to a harassment complaint." The EEOC contends that it "needed only to investigate, issue a cause finding as to, and conciliate each *type* of discrimination alleged."

In its analysis, the district court acknowledged that "the EEOC was entitled to expand its investigation of Starke's Charge and consider whether CRST had tolerated the sexual harassment of other female drivers." *Id.* at *15. It noted that, during the course of its investigation, the EEOC did discover "the allegations of a number of other female drivers, including Essig, Morgan, Peeples and Thiel." *Id.* (concluding that these female drivers' allegations of sexual harassment grew out of the EEOC's investigation of Starke's Charge). The court also recognized that it could "not second-guess the EEOC's finding in the Letter of Determination that," *inter alia*, reasonable cause existed "'to believe that [CRST] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.'" *Id.*

Nevertheless, the court determined that, based on the factual record in this case, "the EEOC did not conduct *any* investigation of the specific allegations of

the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." *Id.* at *16. The district court concluded that the EEOC "wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons for whom the EEOC ... intend[ed] to seek relief at trial." *Id.* The court based its conclusion upon the following, undisputed facts:

- The EEOC did not investigate the specific allegations of any of the 67 allegedly aggrieved persons until after the Complaint was filed. For example, the EEOC did not interview any witnesses or subpoena any documents to determine whether any of their allegations were true.
- The EEOC did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's "class" until after it filed the Complaint. Indeed, prior to filing the Complaint, CRST enquired as to the size of the "class[,]" and the EEOC responded that it did not know.
- The EEOC did not make a reasonable[-]cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint. Indeed, at the time the EEOC issued the Letter of Determination on July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons *had not yet been sexually harassed.* Indeed, most of these 27 women allege they were sexually harassed *after the instant*

> *lawsuit was filed.* Although 38 of the remaining 40 allegedly aggrieved persons allege [that] they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint. The EEOC used discovery in the instant lawsuit to find them.
>
> - The EEOC did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved persons prior to filing the Complaint.

Id. (internal footnote omitted).

The EEOC's suit alleging multiple acts of discrimination by CRST arose out of Starke's single initiating charge. Relevant precedents permit such an expansion by the EEOC, so long as the EEOC satisfies all of its pre-suit obligations for each additional claim. The Supreme Court has observed that when the EEOC brings suits under § 706 on behalf of a group of aggrieved persons, the EEOC is "master of its own case." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). And, as a general rule, "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984).

Although "the EEOC enjoys wide latitude in investigating and filing lawsuits related to charges of discrimination, Title VII limits that latitude to some degree by 'plac[ing] a strong emphasis on administrative, rather than judicial, resolution of

disputes.'" *U.S. Equal Opportunity Comm'n v. Dillard's Inc.*, No. 08–CV–1780–IEG (PCL), 2011 WL 2784516, at *5 (S.D. Cal. July 14, 2011) (slip op.) (quoting *EEOC v. Jillian's of Indianapolis, Ind., Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003)). For our part, we have recognized that

> [t]he permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or *developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

EEOC v. Delight Wholesale Co., 973 F.2d 664, 668 (8th Cir. 1992) (emphasis added). Thus, while "[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged," it "must discover such individuals and wrongdoing *during the course of its investigation.*" *Dillard's Inc.*, 2011 WL 2784516, at *6 (citing *Jillian's*, 279 F. Supp. 2d at 980; *EEOC v. Harvey L. Walner & Assoc.*, 91 F.3d 963, 968 (7th Cir. 1996) ("[The] EEOC may allege in a complaint whatever unlawful conduct it has uncovered during the

course of its investigation, provided that there is a reasonable nexus between the initial charge and the subsequent allegations in the complaint."); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 318 (7th Cir. 1996) ("[The EEOC] may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals beyond the charging parties who are identified during the investigation."); *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002) ("[W]here facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." (internal quotation marks omitted)); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994) ("[T]he jurisdictional scope of [an individual] Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation.") (internal quotation marks omitted)). "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation." *Id.* (citing *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1263 (D. Colo. 2007) (citing *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981))).

In summary, while we recognize that "[t]he EEOC enjoys significant latitude to investigate claims of discrimination, and to allege claims in federal court based on the results of its investigations," we find "a

clear and important distinction between 'facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit.'" *Id.* at *7 (quoting *Jillian's*, 279 F. Supp. 2d at 982).[12] "Where the scope of its pre-litigation efforts are limited—in terms of geography, number of claimants, or nature of claims—the EEOC 'may not use discovery in the resulting lawsuit "as a fishing expedition" to uncover more violations.'" *Id.* (quoting *EEOC v. Target Corp.*, No. 02–C–146, 2007 WL 1461298 (E.D. Wis. May 16, 2007) (citing *Walner*, 91 F.3d at 971)).

Here, after Bloomer discovered during the course of her investigation that Essig, Morgan, Peeples, and

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[12] In *Jillian's*, the district court explained that

> [i]t was only after conducting discovery with respect to its original complaint that the EEOC decided to expand its lawsuit to include a nationwide class. The Seventh Circuit approached this issue in *Walner*, where it impliedly distinguished between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit. "We wholeheartedly agree with EEOC's point that it may obtain relief for instances of discrimination that it discovers during an investigation of a timely charge.... However, these investigations may not be accomplished through a process of discovery that follows a complaint based upon an insufficient charge of discrimination." *Id.* at 971–972 (emphasis added). We conclude that the same standard must be applied to the relationship between the lawsuit and its underlying investigation as is applied to the relationship between the lawsuit and its underlying charge.

Id. at 981–82.

Thiel "had filed formal charges of discrimination against CRST for alleged sexual harassment," the EEOC requested that "CRST provide 'a copy of all other [c]harges of [d]iscrimination that [CRST] has received in the past five years from any government agency that alleges sexual harassment.'" *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *3. It additionally requested that CRST provide "'the name, gender, home address, and home telephone number of all employees that were trained by either [Smith] and/or [Goodman],' including 'the dates of the training and documentation of any complaints made against these two trainers by any of these trainees.'" *Id.* The EEOC later requested information for "female driver[s] that began [their] employment on or after January 1, 2005." *Id.* at *4. Although CRST felt that the EEOC's request for such information was "overly broad," it ultimately "mailed the remainder of the information to the EEOC on a computer disc." *Id.* at *5. Thereafter, the EEOC issued a Letter of Determination to CRST, stating, *inter alia*, that "'there is reasonable cause to believe that [CRST] has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.'" *Id.* at *6.

"The Letter of Determination did not provide CRST with any notice as to the size of the 'class of employees and prospective employees [subjected] to sexual harassment.'" *Id.* at *8. And, during conciliation, the EEOC was unable "to provide [CRST] names of all class members ..., or an indication of the size of the class." *Id.* at *7. Likewise, "the EEOC's Complaint provides no indication of how many 'similarly situated

female employees' the EEOC alleged to exist." *Id.* at *8. It was not until *after* the commencement of the instant suit that the EEOC sought to ascertain the size of the class. *See id.* at *9 ("On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial."). The number of purported class members continuously changed throughout the discovery process. *See id.* at *9–10. Ultimately, the EEOC identified 67 members of the "class." *Id.* at *10.

The EEOC's aforementioned conduct demonstrates that it did not reasonably investigate the class allegations of sexual harassment "during a reasonable investigation of the charge." *Delight Wholesale Co.*, 973 F.2d at 668. Instead, it engaged in fact-gathering as to the "class" "during the discovery phase of an already-filed lawsuit." *Dillard's Inc.*, 2011 WL 2784516, at *7 (quotation and citation omitted). Our review of the undisputed facts demonstrates that the EEOC was "us[ing] discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id.* (quotation and citation omitted). "[T]he EEOC did not investigate

the specific allegations of *any* of the 67 allegedly aggrieved persons [, i.e., the class members,] until *after* the Complaint was filed." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *16 (emphasis added). Tellingly,

> at the time the EEOC issued the Letter of Determination on July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons had not yet been sexually harassed. Indeed, most of these 27 women allege they were sexually harassed after the instant lawsuit was filed. Although 38 of the remaining 40 allegedly aggrieved persons allege they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint.

Id.

Absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate. *See EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 n.14 (4th Cir. 1976) ("Since the determination of reasonable cause defines the framework for conciliation, it follows that the issues to be litigated here must be those which can fairly be said to be encompassed within the determination resulting from the [initiating] charge.") (quotations and citation omitted).[13]

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[13] "Notably, the EEOC did *not* allege that CRST was engaged in 'a pattern or practice' of illegal sex-based discrimination or otherwise

Moreover, contrary to the EEOC's contention, the district court did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint as to these 67 women. Under § 706(f)(1) of Title VII, "[u]pon request, the court *may, in its discretion,* stay further proceedings for not more than sixty days pending ... further efforts of the EEOC to obtain voluntary compliance." 42 U.S.C. § 2000e–5(f)(1) (emphasis added). The EEOC concedes in its brief that our review of the district court's decision to stay or dismiss an EEOC suit for failure to satisfy Title VII's pre-suit requirements is for abuse of discretion. In its order below, the district court concluded that "[h]ere, dismissal is a severe but appropriate remedy," footnoting that it "might have stayed the instant action for further conciliation in lieu of dismissal" "[h]ad the EEOC not wholly abdicated its role in the administrative process." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19 & n.24. The present record confirms that the EEOC wholly failed to satisfy its

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plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e–6." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *7 n.14. The district court had "assumed [that] the EEOC had the right to maintain a pattern-or-practice claim in this case but dismissed it with prejudice. The court held as a matter of law that there was insufficient evidence from which a reasonable jury could find that it was CRST's 'standard operating procedure' to tolerate sexual harassment." *Id.* We, like the district court, "express [ ] no view as to whether the EEOC's investigation, determination and conciliation of Starke's Charge would be sufficient to support a *pattern [-]or-practice* lawsuit." *Id.* at *16 n.21 (citing *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 934–44 (N.D. Ill. 2001) (permitting the EEOC to use discovery to find more victims of sexual harassment in a pattern-or-practice case)).

statutory pre-suit obligations as to these 67 women, thus we cannot conclude that the district court abused its discretion in dismissing the EEOC's suit.

B. Judicial Estoppel

1. Judicial Estoppel as Applied to Starke, Payne, and Timmons

The district court also granted summary judgment on the individual claims of Starke, Payne, and Timmons, and also on the EEOC's claims on their behalf. *CRST Van Expedited, Inc.*, 614 F. Supp. 2d at 973–77. Specifically, the district court concluded that, because each of the three women failed to disclose her involvement in the instant lawsuit as a potential source of income on her bankruptcy petition, she is judicially estopped from seeking relief. *Id.* Likewise, the district court also applied judicial estoppel to the EEOC, precluding the EEOC from seeking redress in its own § 706 suit for harassment that Starke, Payne, or Timmons allegedly suffered. *Id.* at 973.

In October 2005, Starke and her husband filed, in the federal bankruptcy court for the Northern District of Texas, a voluntary petition as joint debtors praying for protection under Chapter 7 of the Bankruptcy Code. They did not include a claim for sexual harassment among their contingent assets in their petition, nor did they amend their petition at anytime between December 2005, when Intervener Starke initially filed her administrative charge of discrimination with the EEOC, or March 2006, when the bankruptcy court fully discharged their debts. In December 2008, three months after intervening in the instant lawsuit and

over one year after the EEOC filed it, Starke moved to reopen her and her husband's joint bankruptcy to add the claim as a potential asset.

Similarly, in October 2005, Payne filed, in federal bankruptcy court for the Southern District of Ohio, a voluntary petition under the name of "Christina Sprinkle" for protection under Chapter 13 of the Bankruptcy Code. Payne omitted from her list of assets any potential claim against CRST for sexual harassment. After the EEOC filed the instant lawsuit in September 2007, Payne did not amend her petition's asset schedules to include the claim. On May 24, 2010, Payne received a full discharge.

In March 2008, Timmons and her husband filed, in federal bankruptcy court for the Western District of Missouri, a voluntary petition as joint debtors seeking protection under Chapter 7 of the Bankruptcy Code. Timmons did not disclose any potential cause of action against CRST and, in June 2008, she and her husband received a full discharge.

We review for abuse of discretion a district court's invocation of judicial estoppel. *Triple H Debris Removal, Inc. v. Companion Prop. & Cas. Ins. Co.*, 647 F.3d 780, 785 (8th Cir. 2011) (citing *Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co.*, 617 F.3d 1040, 1051 (8th Cir. 2010)). We apply this deferential standard of review based on our acknowledgment that the district court is best equipped to decide judicial estoppel's applicability "because determining whether a litigant is playing fast and loose with the courts has a subjective element and its resolution draws upon the trier's intimate knowledge of the case at bar and his or her

first-hand observations of the lawyers and their litigation strategies." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1046 (8th Cir. 2006) (quotation, alteration, and citation omitted). We will uphold the district court's decision to apply judicial estoppel "unless it plainly appears that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the proper factors." *Id.* at 1046–47 (quotations and citation omitted).

As an initial matter, we need not address Starke's contention that the district court abused its discretion in judicially estopping her from prosecuting her intervener claims against CRST. Starke alleges in her brief that the district court failed to consider certain mitigating factors counseling against judicial estoppel's application. Specifically, Starke maintains that she inadvertently failed to include her intervener claim in her bankruptcy petition. She claims that the language barrier created by her German birth and consequent lack of fluency in English limited her ability to assist her bankruptcy counsel. Starke also notes that, "as soon as [she] learned that her claim against CRST should have been disclosed, [she] took immediate steps to have the bankruptcy reopened and her filings amended to contain the claim against CRST." However, Starke's counsel conceded at oral argument that Starke lacked standing to assert her Title VII claim.[14] In light

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[14] At oral argument, the court inquired as to whether, "in light of the bankruptcy proceeding" and *United States ex rel. Gebert v. Transport Administrative Services*, 260 F.3d 909 (8th Cir. 2001), Starke had standing to pursue her claim. In response, Starke's counsel stated:

of this concession, we need not address Starke's appeal of the district court's decision to judicially estop Starke from pursuing her intervener claims against CRST, and we instead consider only whether the district court abused its discretion in judicially estopping Payne and Timmons.

As the Supreme Court has explained, the doctrine of judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)). By logical extension, "[j]udicial estoppel [also] prevents a person who states facts under oath during the course of a trial from denying those facts in a second suit, even though the parties in the second suit may not be the same as those in the first." *Stallings*, 447 F.3d at 1047 (quotations and citation omitted). This doctrine "protects the integrity of the judicial process." *Id.*

> It sounds to me like, in all honesty, she probably never should have been in the district court. There probably never should have been merits of determination against her. There was not only no jurisdiction here, there was no jurisdiction there. Looking at it now, I think we did the best we could. There shouldn't have been merits of determination. It should have been a dismissal without prejudice in the district court. *In all honesty, there is no standing, no jurisdiction ever.* That is how I see that. Thank you.

(Emphasis added.)

(quotations and citation omitted). Although "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *id.* (citing *New Hampshire*, 532 U.S. at 750, 121 S. Ct. 1808), the Supreme Court, in *New Hampshire v. Maine*, articulated a non-exhaustive list of "[t]hree factors ... [to] aid a court in determining whether to apply the doctrine," *id.* (citing *New Hampshire*, 532 U.S. at 751, 121 S. Ct. 1808).

> "First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Id. (quoting *New Hampshire*, 532 U.S. at 750–51, 121 S. Ct. 1808).

Taking each factor in turn, we conclude that the district court did not abuse its discretion by judicially estopping Payne and Timmons from pursuing their respective claims insofar as they may seek to

subsequently intervene in the EEOC's action or otherwise seek relief individually. Notably, with respect to the first factor concerning a clear inconsistency between former and subsequent positions, we have observed that, "[i]n the bankruptcy context, a party may be judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Id.* Estoppel may apply because "a debtor's failure to list a claim in the mandatory bankruptcy filings is tantamount to a representation that no such claim existed." *Id.* (quotations and citation omitted). As recounted above, none of the women disclosed their involvement or potential involvement in this action.

"The second *New Hampshire* factor requires that the bankruptcy court have adopted the debtor's position." *Id.* at 1048. This factor might be satisfied "where the bankruptcy court issues a 'no asset' discharge," thereby evidencing that "the bankruptcy court has effectively adopted the debtor's position." *Id.* Again, as already noted, Payne, and Timmons each procured a full discharge without disclosing her potential claim against CRST. In contrast, in *Stallings*, we found "no judicial acceptance of Stallings's inconsistent position" because "the bankruptcy court never discharged Stallings's debts based on the information that Stallings provided in his schedules." *Id.* at 1149. Payne filed her bankruptcy petition in 2005, prior to the institution of suit, but that does not spare her from possible judicial estoppel. Under the principles of judicial estoppel, she was still obliged to

amend her petition to disclose her involvement or potential involvement in the post-petition lawsuit. *Id.* at 1148. As we stated in *Stallings*,

> a debtor who files h[er] bankruptcy petition, subsequently receives a right-to-sue letter from the EEOC, and then fails to amend h[er] bankruptcy petition to add h[er] lawsuit against h[er] employer as a potential asset is estopped from bringing the lawsuit because the debtor "knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court." *DeLeon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003).

Id.

"Under the final *New Hampshire* factor, the debtor's non-disclosure of the claim must not be inadvertent and must result in the debtor gaining an unfair advantage." *Id.* We have stressed that, pursuant to this third factor, a district court should not judicially estop a debtor whose prior inconsistent position was attributable to "a good-faith mistake rather than as part of a scheme to mislead the court." *Id.* (quotations and citation omitted); *accord New Hampshire*, 532 U.S. at 753, 121 S. Ct. 1808 ("We do not question that it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." (quotations and citation omitted)). That said, no evidence of any such good-faith error or omission is present in this case. In fact, some evidence suggests otherwise. As already noted, Starke herself concedes that the district court correctly judicially estopped her. Also, Timmons and her

husband filed their joint petition an entire year after the EEOC instituted suit in this matter, indicating, at the very least, that they had notice of Timmons's potential claim.

Finally, as the district court noted, "[t]he actions of ... Ms. Timmons are especially galling" because she "used the bankruptcy process to discharge or reduce debts *owed to CRST* and now seek[s] to recover funds from CRST free and clear of the bankruptcy process." *CRST Van Expedited, Inc.*, 614 F. Supp. 2d at 975 (citing *New Hampshire*, 532 U.S. at 750, 121 S. Ct. 1808). "'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, *especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.*'" *New Hampshire*, 532 U.S. at 749, 121 S. Ct. 1808 (emphasis added) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895)).

Accordingly, based on this record, we cannot conclude that the district court abused its discretion in judicially estopping Payne or Timmons from individually pursuing their respective claims against CRST for sexual harassment.

2. Judicial Estoppel as Applied to EEOC

The district court also invoked judicial estoppel to bar the EEOC from seeking any remedy on Starke's, Payne's, and Timmons's behalf. Specifically, the district court asserted that "[t]he judicial estoppel doctrine applies part-and-parcel to the EEOC, notwithstanding

the fact that it is the 'master of its own case' and does not merely stand in the shoes of the allegedly aggrieved persons for whom it seeks relief in this action under [§ 706 of Title VII]." *Id.* at 976.

On appeal, the EEOC argues that the district court abused its discretion in applying judicial estoppel to the EEOC because *the EEOC* did not assert an inconsistent position in a prior proceeding. Rather, the EEOC maintains, the past representations of Intervener Starke, Payne, and Timmons, do not bind the EEOC because, in its present posture as a plaintiff suing in its own name under § 706, "[the] EEOC does not merely stand in their shoes, and [the] EEOC's litigation does not exist simply to seek relief on their behalf." (Citing *Waffle House*, 534 U.S. at 296–98, 122 S. Ct. 754.) According to the EEOC, it "filed this litigation not for the personal benefit of any particular claimant, but for the broader public interest in enforcing Title VII and ensuring CRST maintains a workplace free from discrimination."

In response, CRST concedes that "[n]o federal appellate court has yet ruled on this issue" of whether a court can judicially estop the EEOC from bringing suit in its own name to remedy allegedly unlawful employment practices because those practices were perpetrated against an employee who herself is judicially estopped. CRST urges, nevertheless, that the district court did not abuse its discretion in judicially estopping the EEOC. Noting that judicial estoppel's chief purpose "is to protect the integrity of the judicial process," CRST avers that, "[w]hile the individual claimants in an EEOC enforcement action may not

technically be parties to the case, their prior inconsistent representations to another court pose no less of a threat to the integrity of the judicial process."

Upon review, we concur with the EEOC that the district court abused its discretion in judicially estopping the EEOC from suing *in its own name* to correct any discriminatory employment practices that CRST allegedly perpetrated against the three women. The district court's and CRST's contrary position is inconsistent with the realities of the EEOC's role as a plaintiff in its own name under § 706 and with the basic principles of the judicial estoppel doctrine.

As the Supreme Court has emphasized, "[g]iven the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its name for the purpose, among others, of securing relief for a group of aggrieved individuals." *Gen. Tel. Co.*, 446 U.S. at 324, 100 S. Ct. 1698; *see also Occidental Life Ins. Co.*, 432 U.S. at 368, 97 S. Ct. 2447 ("The EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties...."). In *Waffle House*, the Supreme Court considered "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action alleging that the employer has violated Title I of the ... ADA."[15] 534 U.S. at 282, 122 S.

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[15] Although *Waffle House* is technically an ADA case, the Court observed at the outset of its opinion that "Congress has directed

Ct. 754. The Fourth Circuit had held that, insofar as the EEOC was suing in its own capacity under § 706 to vindicate the public interest in discrimination-free workplaces, the EEOC was limited to seeking general injunctive relief and could not also seek victim-specific relief on behalf of a victim who himself was subject to a binding arbitration agreement. *Id.* at 290, 122 S. Ct. 754. The Supreme Court reversed, concluding that such an arbitration agreement between the employer and employee did not preclude the EEOC from suing in federal court to seek victim-specific relief relating to the employee's injury. *Id.* at 298, 122 S. Ct. 754. Specifically, the Supreme Court reasoned that "[t]here is no language in the statutes or in either of these cases suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available." *Id.* at 288, 122 S. Ct. 754. Moreover, in rejecting the Fourth Circuit's conclusion that the EEOC could not recover victim-specific relief because the employee himself would be ineligible for such recovery by virtue of the binding arbitration agreement, the Supreme Court stated as follows:

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the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII ... when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability." 534 U.S. at 285, 122 S. Ct. 754 (citing 42 U.S.C. § 12117(a) (1994)). Thus, the Court determined that "the provisions of Title VII defining the EEOC's authority provide[d] the starting point for [its] analysis." *Id.* at 285–86, 122 S. Ct. 754.

> If it were true that the EEOC could prosecute its claim only with [the employee]'s consent, or if its prayer for relief could be dictated by [the employee], the court's analysis might be persuasive. But once a charge is filed, the exact opposite is true under the statute—the EEOC is in command of the process.... If ... the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit.... The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.

Id. at 291, 122 S. Ct. 754.

Under *Waffle House* a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped. Indeed, under Title VII, "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *Id.* at 296, 122 S. Ct. 754.

Accordingly, the district court abused its discretion in judicially estopping the EEOC from suing in its own name under § 706 to remedy sexual harassment that CRST allegedly perpetrated against Starke, Payne,

and Timmons, and we reverse the district court's grant of summary judgment on that ground accordingly.[16]

C. Merits of EEOC's Hostile Work–Environment Claims

1. Governing Legal Standard

The EEOC also appeals several of the district court's dispositive rulings concerning the merits of its hostile work-environment claims against CRST. "Title VII ... makes it 'an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (quoting 42 U.S.C. § 2000e–2(a)(1)). Importantly, "this language is not limited to 'economic' or 'tangible' discrimination." *Id.* (citation and internal quotations omitted). Rather, as the Supreme Court has observed, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in

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[16] Although the district court abused its discretion in judicially estopping the EEOC from suing in its own name under § 706 to remedy sexual harassment that CRST allegedly perpetrated against, *inter alia*, Payne and Timmons, we nevertheless affirm (1) the district court's grant of summary judgment, in CRST's favor, on the EEOC's hostile work-environment claim on Payne's behalf, *see infra* Part II.C.2., and (2) the district court's grant of summary judgment, in CRST's favor, based on its conclusion that, as a matter of law, CRST promptly and effectively remedied the sexual harassment once it became aware of it, as to Timmons, *see infra* Part II.C.3.

employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.* (citation and internal quotations omitted); *accord Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir. 1999). Thus, "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Id.* (internal citations and quotations omitted).

As we have explained,

> [h]ostile work environments created by supervisors or coworkers have the following elements in common: (1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of employment. *Al–Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005). In addition, for claims of harassment by non-supervisory personnel, [the plaintiff] must show that [her] employer knew or should have known of the harassment and failed to take proper action.

Gordon v. Shafer Contracting Co., 469 F.3d 1191, 1194–95 (8th Cir. 2006). Critically, "[CRST] cannot be vicariously liable for sexual harassment [perpetrated] by non-supervisory coworkers." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010).

> On the other hand, if the harassment was committed by an employee who supervised [the plaintiff], [CRST] as her employer is vicariously liable for the harassment unless it can establish the affirmative defense defined in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) [(hereinafter, the "*Ellerth–Faragher* Defense")].

Joens v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004). Under the *Ellerth–Faragher* Defense, CRST may avoid vicarious liability for a supervisory employee's harassment if it satisfies "'two necessary elements: (a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior[ ] and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'" *Weger v. City of Ladue*, 500 F.3d 710, 718 (8th Cir. 2007) (quoting *Williams v. Mo. Dep't of Mental Health*, 407 F.3d 972, 976 (8th Cir. 2005)).

Thus, we must determine, as a threshold matter, whether CRST's Lead Drivers served as supervisors for CRST's trainees or were merely the trainees' coworkers. *See Alvarez*, 626 F.3d at 419. The district court determined that Lead Drivers did not serve as the trainees' supervisors. In contrast, the EEOC maintained before the district court, as it does here on appeal, that a CRST Lead Driver is a "supervisor" in

every practical sense of the word. Specifically, the EEOC avers that "CRST gives [Lead Drivers] virtually unchecked authority and control over all aspects of a trainee's daily activities, as well as authority to recommend whether a trainee is ready for full-driver status, and their recommendations are virtually always followed." CRST counters that "the functions and powers that [the] EEOC attributes to [L]ead [D]rivers are no greater than those of the team leaders and foreman that this court has held are not supervisors."

Applying our precedent, we agree with the district court that CRST's Lead Driver is not a supervisory employee. Therefore, CRST is not vicariously liable for any harassment that its Lead Drivers allegedly perpetrated against female trainees. "[T]o be considered a supervisor, 'the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.' "*Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (quoting *Joens*, 354 F.3d at 940). It is undisputed that none of CRST's Lead Drivers wielded any such power. On the contrary, the record reflects that, at best, CRST's Lead Drivers could only (1) dictate minor aspects of the trainees' work experience, such as scheduling rest stops during the team drive and (2) issuing a non-binding recommendation to superiors at the training program's conclusion concerning whether CRST should upgrade the trainee to full-driver status.

Under our case law, neither of these prerogatives makes a Lead Driver the trainee's "supervisor."

First, our circuit has held that "[t]he fact that an alleged harasser may have been a 'team leader' with the authority to assign employees to particular tasks will not be enough to make that person a supervisor." *Merritt v. Albemarle Corp.*, 496 F.3d 880, 883 (8th Cir. 2007) (quotations and citation omitted). Thus, in *Weyers*, we declined to designate a "team leader" a supervisor because, "[a]lthough [the alleged harasser] had the authority as team leader to assign employees to particular tasks, he could not reassign them to significantly different duties." *Weyers*, 359 F.3d at 1057. Similarly, in *Merritt*, we refused to recognize the allegedly harassing "reliability technician," 496 F.3d at 881, as a supervisor because "[h]is authority was restricted to assigning [the plaintiff] to work on various tasks that were part of her work duties," *id.* at 884. The same holds true here. The EEOC has adduced no evidence suggesting that a CRST Lead Driver possessed the power to do anything more than assign a trainee to specific tasks already within that trainee's normal, day-to-day duties.

Second, CRST's reliance, in part, on a Lead Driver's evaluation of a trainee's performance to decide whether to promote that trainee to full-driver status is insufficient to render a Lead Driver a supervisor. Although the Supreme Court declined, in *Ellerth* and *Faragher*, to "answer the question, 'who is a supervisor?,'" *Joens*, 354 F.3d at 940, it did observe that a "tangible employment decision ... may be subject to review by higher level supervisors," *Ellerth*, 524 U.S.

at 762, 118 S. Ct. 2257. Indeed, the EEOC relies on this very observation in *Ellerth* to support its own assertion that "[i]t is immaterial that CRST may, on occasion, not follow a trainer's recommendation." However, the EEOC's argument in this regard fails for two reasons. First, aside from its bare assertion, the EEOC offers no evidence that CRST simply "rubber stamped" its Lead Drivers' recommendations. *See Staub v. Proctor Hosp.*, — U.S. ——, 131 S. Ct. 1186, 1194, 179 L. Ed. 2d 144 (2011) (holding that if a non-decisionmaker performs an act motivated by a discriminatory bias that is intended to cause, and that does proximately cause, an adverse employment action, then the employer has "cat's paw" liability). Second, we have concluded, under almost identical circumstances, that a coworker's authority to make mere *recommendations* or evaluations to a superior about tangible employment decisions pertaining to a fellow employee does not constructively promote that coworker to a supervisor for purposes of vicarious Title VII liability. *See, e.g., Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005) (holding that a harassing foreman was merely his victim's coworker, and not the victim's supervisor, because the foreman's own supervisor possessed the authority to hire, fire, and promote the laborers, and "although [the foreman's supervisor] may have consulted with [the harassing foreman] on such matters, the record [was] clear that [the harassing foreman] lacked any such authority"); *Weyers*, 359 F.3d at 1057 ("While it is true that [the alleged harasser] signed at least three of [the plaintiff's] initial performance evaluations and that [the supervisor] acknowledged that he had based his decision to

terminate [the plaintiff] at least in part on [the plaintiff's] job[-]evaluation scores, [the alleged harasser] himself did not have the authority to take tangible employment action against [the plaintiff].").

Finally, we reject the EEOC's suggestion that, "[a]t a minimum, the authority CRST vests in its trainers creates a basis for liability under the apparent authority doctrine." This court has consistently affirmed that a harassing coworker's "apparent authority would be an insufficient basis to support a finding of supervisor status." *Weyers*, 359 F.3d at 1057 n.7; *accord Cheshewalla*, 415 F.3d at 851 (reaffirming that "[an employee's] belief that [her harassing coworker] possessed the authority of a supervisor does not alter our conclusion" that the harasser is a coworker nonetheless (citing *Weyers*, 359 F.3d at 1057 n.7)).

Thus, we concur with the district court that CRST's Lead Drivers were their trainees' coworkers, not their supervisors. Consequently, CRST cannot be vicariously liable for any sexual harassment in which its Lead Drivers engaged, and the *Ellerth–Faragher* Defense is inapplicable to the instant case. *See Alvarez*, 626 F.3d at 419.

In order to withstand summary judgment on its hostile work-environment claims against CRST, the EEOC must create genuine issues of material fact as to the following elements regarding each allegedly aggrieved female trucker:

> "(1) [that she belongs to] a protected group; (2) [that she suffered] unwelcome harassment; (3)

> [that there was] a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of [her] employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action."

Sheriff v. Midwest Health Partners, P.C., 619 F.3d 923, 929 (8th Cir. 2010) (alterations in original) (quoting *Carter*, 173 F.3d at 700). Given these elements, we next address the district court's summary-judgment rulings against the EEOC on its hostile work environment claims.

2. The Severity or Pervasiveness of Certain Harassment

The district court granted CRST summary judgment on the EEOC's hostile work-environment claims on behalf of three women,[17] concluding that, as a matter of law, each alleged harassment that was neither sufficiently severe nor pervasive to support a hostile work-environment claim. The district granted CRST summary judgment on the EEOC's claims on behalf of 11 additional women,[18] again citing, *inter alia*,[19] insufficient severity or pervasiveness as a

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[17] Victoria Holmes, January Jackson, and Tillie Jones.

[18] Dorothy Dockery, Debra Hindes, Tracy Hughes, Patricia Marzett, Virginia Mason, Lucinda McBlair, Sherry O'Donnell, Christina Payne, Peggy Pratt, Jonne Shepler, and Linda Skaggs.

[19] The district court alternatively concluded, as a matter of law, that nine of these 11 additional women—all except Payne and

matter of law. The EEOC appeals these rulings, maintaining that the summary-judgment record contains enough evidence to create a fact question regarding the severity or pervasiveness of the harassment that each woman suffered.

A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "We review *de novo* the district court's grant of summary judgment, viewing the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Mayer v. Countrywide Home Loans*, 647 F.3d 789, 791 (8th Cir. 2011).

On each female trucker's behalf, the EEOC must create a genuine issue of material fact concerning whether "the harassment affected a term, condition, or privilege of [her] employment." *Carter*, 173 F.3d at 700. "Such discrimination extends beyond terms and conditions in the 'narrow contractual sense' and includes discriminatory harassment *so severe or pervasive* as to alter the conditions of employment and create a hostile working environment." *Id.* (emphasis added) (citing *Faragher*, 524 U.S. at 786, 118 S. Ct. 2275; *Meritor Sav. Bank, FSB*, 477 U.S. at 67, 106 S. Ct.

Skaggs—either (a) failed to timely and properly notify CRST of the harassment that they suffered, thereby depriving CRST of the opportunity to remedy it, or (b) did timely and properly notify CRST of the harassment, but the company promptly and effectively remedied it.

2399). "There can be no doubt federal harassment standards are demanding.... Indeed, the Supreme Court has 'made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.'" *Al–Zubaidy*, 406 F.3d at 1038 (quoting *Faragher*, 524 U.S. at 788, 118 S. Ct. 2275) (internal citation omitted). Only "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [is] Title VII violated." *Harris*, 510 U.S. at 21, 114 S. Ct. 367 (internal quotations and citations omitted). Conversely, "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.*

"A number of factors are relevant in assessing the magnitude of harassment, including the frequency and severity of the discriminatory conduct, whether it is physically threatening or humiliating or only an offensive utterance, [and] whether it unreasonably interferes with the employee's work performance...." *Carter*, 173 F.3d at 702. We also consider a harassment victim's "physical proximity to the harasser[ ] and the presence or absence of other people." *Id.* (internal citations omitted). Proximity and the absence of others are relevant here given the confined quarters and remote setting in which CRST's trainees worked with their Lead Drivers. "Once there is evidence of improper conduct and subjective offense, the

determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." *Sheriff*, 619 F.3d at 931.

Applying these standards we conclude that, except as to two women—Sherry O'Donnell and Tillie Jones—the district court did not err in granting CRST summary judgment after determining that the women complained of harassment that was neither sufficiently severe nor pervasive. The record reveals complaints about their Lead Drivers' poor personal hygiene,[20] boasting about past sexual exploits, sporadic remarks of sexual vulgarity, and highly offensive but isolated instances of propositioning for sex. None of the relevant factors listed above, including the women's "physical proximity to [their] harasser[s] and the presence or absence of other people," *Carter*, 173 F.3d at 702, meet the applicable standard that the alleged harassment was so severe or pervasive that it "alter[ed] the conditions of the [women's] employment." *Harris*, 510 U.S. at 21, 114 S. Ct. 367 (internal quotations and citations omitted). Regarding the Lead Drivers' poor hygienic practices, we have noted that "Title VII ... is not a general civility code for the American workplace." *Wilkie v. Dep't of Health & Human Servs.*, 638 F.3d 944, 953 (8th Cir. 2011) (quotations and citation omitted); *accord Faragher*, 524 U.S. at 788, 118 S. Ct. 2275. Although a Lead Driver's

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[20] By way of example, several women complained that, to minimize stops while in transit, their male Lead Drivers habitually urinated in plastic bottles with no regard for their female trainee, who often heard or even smelled the foul activity.

poor hygiene undoubtedly made for an unpleasant work environment, this "[m]erely rude or unpleasant conduct is insufficient to support a claim" for hostile work environment. *Id.* (quotations and citation omitted). As for the boasting about past sexual exploits and sporadic, sexually vulgar remarks, a de novo review reveals that they mostly constituted "mere offensive utterance[s]," *Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1127 (8th Cir. 2000) (quotations and citation omitted), and we have cautioned that "[s]poradic or casual comments are unlikely to support a hostile environment claim," *Carter*, 173 F.3d at 702. With respect to the isolated propositioning, this court and the Supreme Court have stated that "'[m]ore than a few isolated incidents are required'" to support a hostile work-environment claim. *Clearwater*, 231 F.3d at 1127 (quoting *Meritor Sav. Bank*, 477 U.S. at 67, 106 S. Ct. 2399). Consequently, the district court did not err in concluding, as a matter of law, that 12 women did not suffer sufficiently severe or pervasive harassment to survive summary judgment.

The EEOC did, however, establish material issues of fact regarding the harassment that O'Donnell and Jones allegedly suffered. We hold that the district court erred in concluding, as a matter of law, that the harassment they suffered was insufficiently severe or pervasive. O'Donnell testified in her deposition that, among others, co-driver Anthony Sears subjected her to persistent sexual harassment during the seven days that she spent with him over the road. Specifically, O'Donnell testified that, over the course of that seven-day trip, Sears (1) asked her, on "three to five"

occasions, to drive naked; (2) refused O'Donnell's repeated requests to exit at a truck stop so she could go to the bathroom, ordering her to urinate in a parking lot instead; and (3) in a culminating incident, grabbed O'Donnell's face while she was driving and began screaming that "all he wanted was a girlfriend." Regarding this third incident, O'Donnell testified that Sears grabbed her face so vigorously that it caused one of her teeth to lacerate her lip. Viewing all facts and drawing all inferences therefrom in the light most favorable to the EEOC, as we must, *Mayer*, 647 F.3d at 791, this testimony creates a genuine fact issue as to the severity of the harassment that O'Donnell allegedly suffered. Given that Sears allegedly perpetrated all of these acts in a week's time, the conduct was frequent. *See Carter*, 173 F.3d at 702. Sears's directive that O'Donnell publicly urinate in a parking lot is a patent attempt at humiliation. *See id.* (citation omitted). Moreover, Sears's act of grabbing O'Donnell's face, was, by its very nature, "physically threatening." *Id.* Finally, upon assessing these characteristics of Sears's alleged conduct in light of O'Donnell's physical proximity to Sears and the absence of other people, we must conclude that the EEOC has produced enough evidence of severity of O'Donnell's alleged harassment to make it a question for the jury. *See Sheriff*, 619 F.3d at 931 ("Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury.").[21]

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[21] Still, as we explain in Part II.C.3 *infra*, the district court did not err in granting summary judgment on the EEOC's claim on

The district court erred in concluding, as a matter of law, that Tillie Jones suffered harassment that was neither sufficiently severe nor pervasive. Jones testified that, on three or four occasions over the course of a two-week training trip, her Lead Driver, James Simmons, entered the cab wearing only his underwear and rubbed the back of her head, despite repeated requests by Jones that he stop. Jones also testified that, "everyday," Simmons entered the cab in his underwear while she was driving. Additionally, according to Jones, Simmons called her "his bitch" five or six times, including on one occasion when, in response to Jones's complaints about his slovenly habits, he ordered Jones to clean up the truck, declaring "that's what you're on the truck for, you're my bitch. I ain't your bitch. Shut up and clean it up." Finally, Jones testified that, like many of CRST's Lead Drivers, Simmons routinely urinated in plastic bottles and ziplock bags while in transit. However, Jones testified that Simmons would leave his urine receptacles about the truck's cab and that when Jones implored Simmons to gather them, Simmons ordered her to "shut up and clean it up." No overt physical threat or contact was present, but the evidence suffices to create a genuine issue of material fact concerning the severity or pervasiveness of the harassment which the EEOC alleges that Jones suffered.

In sum, we affirm the district court's summary judgment, in CRST's favor, on the EEOC's hostile

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O'Donnell's behalf because CRST took prompt and effective remedial action when O'Donnell complained about Sears's conduct.

work-environment claims on behalf of 12 women,[22] concurring in the district court's conclusion that, as a matter of law, the alleged harassment was neither sufficiently severe nor pervasive. However, we reverse the district court's grant of summary judgment as to the EEOC's claims on behalf of Tillie Jones. We conclude that the EEOC created a genuine issue of material fact as to the severity or pervasiveness of the harassment that Jones allegedly suffered. Finally, although we also conclude that the EEOC has created a genuine fact issue as to the severity or pervasiveness of the harassment that Sherry O'Donnell allegedly suffered, for the reasons stated in Part II.C.3. *infra*, we affirm the district court's grant of summary judgment on the EEOC's claims on her behalf.

3. CRST's Notice and/or Remedying of the Alleged Harassment

The EEOC also appeals the district court's grant of summary judgment on its claims as to 34 women[23] who,

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[22] Dorothy Dockery, Debra Hindes, Victoria Holmes, Tracy Hughes, January Jackson, Patricia Marzett, Virginia Mason, Lucinda McBlair, Christina Payne, Peggy Pratt, Jonne Shepler, and Linda Skaggs.

[23] Antoinette Baldwin, Bonnie Batyik, Mary Beaton, Bethany Broeker, Kim Chisholm, Catherine Coronado, Samantha Cunningham, Denise Desonier, Dorothy Dockery, Maybi Fernandez-Fabre, Catherine (Granofsky)-Fletcher, Debra Hindes, Tracy Hughes, January Jackson, Ginger Laudermilk, Patricia Marzett, Virginia Mason, Lucinda McBlair, Verona McIver, Bonnie Moesch, Sherry O'Donnell, Tammi Pile, Sharon Pinchem, Peggy Pratt, Danette Quintanilla, Kathleen Seymour, Faith Shadden, Jonne Shepler, Mary "Emily" Smith, Jennifer

according to the district court, either (1) allege harassment that CRST neither knew nor should have known about or (2) allege harassment that CRST, upon being notified of, promptly and effectively remedied. Specifically, the district court granted summary judgment on the EEOC's claims concerning 11 women, *see supra* n.5, and some days later granted summary judgment as to 22 more. Additionally, in its order granting CRST summary judgment on the EEOC's claims on behalf of January Jackson for insufficient severity or pervasiveness, the district court alternatively concluded that CRST neither knew nor should have known about her harassment.

We have already affirmed the district court's grant of summary judgment affecting nine[24] of these 34 women based on its alternative conclusion that their alleged harassment was not sufficiently severe or pervasive. *See supra* Part II.C.2. Therefore, we need not address whether CRST knew or should have known about the harassment that those nine women suffered. *See Alvarez*, 626 F.3d at 419 ("When an employee complains about inappropriate conduct that does not rise to the level of a violation of law, ... there is no liability for a failure to respond.").

Susson, Robin Timmons, Rachel Tucker, Diana Vance, and Betsy Ybarra.

[24] Dorothy Dockery, Debra Hindes, Tracy Hughes, January Jackson, Patricia Marzett, Virginia Mason, Lucinda McBlair, Peggy Pratt, and Jonne Shepler.

As to the remaining 25 women,[25] we conducted a de novo review of all record evidence. Based on that review we hold that the EEOC failed, as a matter of law, to investigate and/or conciliate its claims on behalf of four of them—Bonnie Batyik, Bethany Broeker, Verona McIver, and Diana Vance. Specifically, each woman complains of harassment that CRST allegedly perpetrated after the filing of the instant lawsuit on September 27, 2007.[26] We reserve the right to affirm a district court's grant of summary judgment on any ground that the summary-judgment record supports. *W3i Mobile, LLC v. Westchester Fire Ins. Co.*, 632 F.3d

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[25] Antoinette Baldwin, Bonnie Batyik, Mary Beaton, Bethany Broeker, Kim Chisholm, Catherine Coronado, Samantha Cunningham, Denise Desonier, Maybi Fernandez-Fabre, Catherine (Granofsky)-Fletcher, Ginger Laudermilk, Verona McIver, Bonnie Moesch, Sherry O'Donnell, Tammi Pile, Sharon Pinchem, Danette Quintanilla, Kathleen Seymour, Faith Shadden, Mary "Emily" Smith, Jennifer Susson, Robin Timmons, Rachel Tucker, Diana Vance, and Betsy Ybarra.

[26] In her deposition, Batyik admitted that she did not even begin working at CRST until January 24, 2008, and alleges that Lead Driver David Buckner sexually harassed her for four weeks from January 27, 2008, until February 25, 2008. Similarly, Broeker concedes she did not commence employment with CRST until August 4, 2008, and that the EEOC's claims on her behalf stem from harassment that she allegedly suffered at the hands of Lead Driver Sean Pourfahm, from August 13, 2008, until August 15, 2008. McIver began her second stint of employment with CRST in November 2007 and alleges that Lead Driver Henry Nei sexually harassed her from February 15, 2008, until February 22, 2008. Finally, Diana Vance began her employment on June 11, 2008, and alleges sporadic harassment throughout her employment until her termination on August 6, 2008.

432, 436 (8th Cir. 2011). Accordingly, as to these four women, we will affirm the district court's grant of summary judgment on the alternative ground that the EEOC failed to discharge its pre-suit duties under Title VII to investigate and conciliate these claims, as they did not even accrue until after the EEOC had instituted the action. *See supra* Part II.A.2.

Regarding the remaining 21 women, because the women's Lead Drivers and co-drivers were their coworkers rather than their supervisors, *see supra* Part II.C.1., the EEOC must, as part of its burden on summary judgment, create a genuine issue of material fact as to whether CRST "[(1)] knew or should have known of the harassment *and* [(2)] failed to take prompt and effective remedial action." *Carter*, 173 F.3d at 693 (emphasis added). Stated another way, "[CRST] may be directly liable for its employees' actions that violate Title VII if the company knows or should have known of the conduct, *unless* it can show that it took immediate action and appropriate corrective action." *Alvarez*, 626 F.3d at 419 (emphasis added) (quotations and citation omitted). Regarding the 25 women in question, our de novo review of the EEOC's claims concerning each woman confirms the district court's conclusion that no fact issue remained because (1) CRST neither knew nor should have known about the alleged harassment to remedy it because the woman failed to report it soon enough, or at all; or (2) the woman timely reported the harassment, and CRST promptly and effectively remedied it.

With respect to CRST's knowledge, we have stated that either an employer's actual or constructive notice

of ongoing coworker-on-coworker harassment may subject the employer to direct liability for that harassment unless the employer takes prompt corrective action. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009). "An employer has actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it." *Id.* at 802 (citation omitted). Simply put, "[i]n the context of sexual harassment claims, '[a]ctual notice is established by proof that management *knew* of the harassment.'" *Id.* (second alteration in original) (quoting *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003)). Constructive notice is established in the following circumstances: "[(1)] where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or [(2)] where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it." *Id.* (quoting *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294 (3d Cir. 1999)).

Of the remaining 21 women, we conclude, as a matter of law, that CRST lacked *actual* notice as to ten of them.[27] Specifically, each of these ten women either

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[27] Antoinette Baldwin, Kim Chisholm, Catherine Coronado, Maybi Fernandez–Fabre, Catherine (Granofsky)–Fletcher, Bonnie Moesch, Tammi Pile, Sharon Pinchem, Rachel Tucker, and Betsy Ybarra.

never reported the alleged sexual harassment to CRST or reported it too late to afford CRST a reasonable opportunity to promptly and effectively address it. We note that, "[i]n some cases, ... an employee may be excused for a delay in reporting harassment, if the employee can demonstrate a truly credible threat of retaliation." *Alvarez*, 626 F.3d at 422 (quotations and citation omitted). However, a thorough review of each woman's deposition testimony confirms that the EEOC has failed to demonstrate that any of these ten women faced such a credible threat.[28] Thus, CRST lacked actual notice because the EEOC has produced no evidence "that management *knew* of the harassment." *Sandoval*, 578 F.3d at 802 (quotations and citation omitted).

Furthermore, on the present record, we must also conclude, as a matter of law, that CRST lacked constructive knowledge of any harassment that the ten women allegedly suffered. The EEOC's argument to the contrary is linked to its separate contention that the district court abused its discretion in excluding

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[28] In fact, the only woman before us whose record demonstrates such a credible threat is Bonnie Batyik, who testified in her deposition that her harasser, Lead Driver Phillip Buckner, threatened that "if [she] told Bill, the dispatch, or anyone, basically, that [the harassment] would go to another level and that it wouldn't be good for [her] so [she] should keep [her] mouth shut." This is the type of "credible threat" that we recognize as excusing an employee's failure to promptly report harassment by a coworker. Nevertheless, as already noted, summary judgment on the EEOC's claims concerning Batyik is appropriate because the EEOC failed to investigate and conciliate them as Title VII requires. *See supra* Part II.C.3.

documentary evidence pertaining to the 99 women for whom the district court precluded the EEOC from seeking relief. Specifically, as a discovery sanction for the EEOC's failure to present these 99 women to CRST for deposition, the district court—as it had forewarned in a prior order—precluded each woman from testifying at trial and barred the EEOC from seeking relief on her behalf in the instant case. However, in opposing CRST's motion for summary judgment concerning the company's constructive notice of harassment, the EEOC included records of these 99 women's harassment complaints to CRST, their Qualcomm messages, and other documentary evidence. CRST moved to strike this evidence from the summary-judgment record, citing the district court's discovery sanction. The district court subsequently granted the motion, concurring with CRST that permitting the EEOC to introduce evidence of the 99 women's complaints would amount to an "end-run" around its discovery sanction precluding the EEOC's relief on their behalf. *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *16. On appeal, the EEOC maintains that (1) the district court abused its discretion by excluding this evidence pursuant to its prior discovery sanction, and (2) should we reverse the district court and order the inclusion of the evidence in the summary-judgment record, that we also reverse the district court's grant of summary judgment in light of the new evidence—evidence that the EEOC avers is relevant to whether CRST possessed constructive knowledge of allegedly rampant harassment in its training program. *See Sandoval*, 578 F.3d at 802–03 (concluding that, in light of plaintiffs' allegations that

the employer "was aware of nearly one hundred similar [sexual-harassment] complaints made during the time plaintiffs were employed," "the district court erred in disregarding," on summary judgment, "the evidence of widespread sexual harassment," as such evidence is "highly relevant to prove the sexual harassment was severe and pervasive and that [the employer] had constructive notice").

Although we review the district court's grant of summary judgment de novo, *Mayer*, 647 F.3d at 791, "[w]e review the district court's imposition of discovery sanctions for abuse of discretion," *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 898 (8th Cir. 2009) (quotations and citation omitted). The undisputed record reflects that, after protracted discovery, the district court ordered the EEOC, by a certain date, to present for deposition all allegedly aggrieved women. Moreover, the district court directed that "[i]f the EEOC fails to make a woman available, as a discovery sanction *the court will not permit her to testify at trial* and will bar the EEOC from seeking relief on her behalf in this case." *EEOC v. CRST Van Expedited, Inc.*, 257 F.R.D. 513, 519 (N.D. Iowa 2008) (emphasis added). The EEOC concedes that it failed to present for deposition the 99 women. In response to a party's failure to obey such a discovery order, the Federal Rules of Civil Procedure plainly authorizes a district court to "prohibit the disobedient party from supporting or opposing designated claims or defenses, *or from introducing designated matters in evidence.*" Fed.R.Civ.P. 37(b)(2)(A)(ii) (emphasis added). Notably, the EEOC does *not* appeal the propriety of the

discovery sanction *itself*, but only the district court's enforcement of it. Citing our decision in *Sandoval*, 578 F.3d at 802–03, the EEOC emphasizes the excluded evidence's purported relevance to the question of whether CRST was on constructive notice of the alleged harassment. However, the EEOC offers no direct support for its contention that, by enforcing its own discovery sanction—whose propriety the EEOC does *not* appeal—the district court abused its discretion. Likewise, on this record, we find no evidence that the district court abused its discretion by enforcing its own valid discovery sanction.

Consequently, in granting summary judgment based on its conclusion that, as a matter of law, CRST lacked constructive notice as to the ten women presently at issue, the district court did not premise its ruling on an incomplete summary-judgment record. Moreover, our de novo review of this record reveals no fact issue as to CRST's constructive notice. Specifically, the EEOC has failed to adduce sufficient evidence to create a fact issue as to whether "the harassment was so broad in scope, and so permeated the workplace, *that it must have come to the attention of someone authorized to do something about it.*" *Id.* at 802 (quotations and citation omitted).

With respect to the remaining 11 women,[29] we affirm the district court's grant of summary judgment

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[29] Mary Beaton, Samantha Cunningham, Denise Desonier, Ginger Laudermilk, Sherry O'Donnell, Danette Quintanilla, Kathleen M. Seymour, Faith Shadden, Mary Smith, Jennifer Susson, and Robin Timmons.

based on its conclusion that, as a matter of law, CRST promptly and effectively remedied the sexual harassment once it became aware of it. "If an employer responds to harassment with prompt remedial action calculated to end it, then the employer is not liable for the harassment." *Alvarez*, 626 F.3d at 421. In assessing the reasonableness of an employer's remedial action, the factors to be considered "include the amount of time that elapsed between the notice and remedial action, the options available to the employer, ... and whether or not the measures ended the harassment." *Id.* (alteration in original, quotations and citation omitted). After reviewing the record pertaining to these 11 women in the light most favorable to the EEOC, we hold that CRST effectively and promptly remedied the harassment once the women reported it.

The record reflects that CRST addressed reported harassment by (1) removing the woman from the truck as soon as practicable, arranging overnight lodging at a motel and subsequent transportation to a CRST terminal at the company's expense; (2) requesting a written statement from the woman; (3) relieving the woman from future assignments with the alleged harasser; and (4) reprimanding the alleged harasser and barring him from team-driving with women indefinitely. These actions, not necessarily in combination, constitute the type of prompt and effective remedial action that our precedents prescribe. When considering the "[remedial] options available to the employer," we have included "employee training sessions, *transferring the harassers, written warnings, reprimands in personnel files,* or termination," as

acceptable options, depending on the particulars of the case. *Carter*, 173 F.3d at 702 (emphasis added). In each of the 11 women's cases, CRST removed the woman from the alleged harasser's truck within 24 hours of the harassment being reported, and often much sooner. *See Alvarez*, 626 F.3d at 421 ("Employees often must tolerate some delay ... so that an employer can gauge the credibility of the complainant and the seriousness of the situation.") (quotations and citation omitted). Moreover, each woman confirmed that they did not suffer any harassment subsequent to their removal.

Accordingly, we affirm the district court's summary judgment as to the remaining 11 women, concurring in its conclusion that, as a matter of law, CRST promptly and effectively remedied any alleged harassment that the women reported.

D. Intervener Peeples's Claims

Peeples appeals the district court's grant of summary judgment to CRST on her hostile work-environment and retaliation claims under Title VII, as well as her state-law claim under the Iowa Civil Rights Act (ICRA). "Consistent with our precedent, the district court concluded that the [ICRA] is interpreted in the same way as Title VII." *Alvarez*, 626 F.3d at 416 n.2. The district court correctly concluded that Peeples's Title VII and ICRA hostile work-environment claims failed as a matter of law "because she did not report the sexual harassment to CRST in a timely manner." *CRST Van Expedited, Inc.*, 2009 WL 1586193, at *15. Peeples delayed reporting the alleged sexual harassment until after she voluntarily left her harasser's truck. Additionally, for the reasons

stated in Part II.C.3 *supra*, the district court properly concluded that there is insufficient evidence in the record to create a fact issue concerning CRST's constructive notice.

We also conclude that the district court *did not* err in granting summary judgment on Peeples's Title VII and ICRA retaliation claims. "This court analyzes ICRA retaliation claims under the same method as federal retaliation claims." *Young–Losee v. Graphic Packaging Int'l, Inc.*, 631 F.3d 909, 912 (8th Cir. 2011) (quotations and citation omitted). The district court concluded that "[a] reasonable jury could not find a causal connection between Ms. Peeples's complaint about [her harasser's] conduct and any adverse employment action." *CRST Van Expedited, Inc.*, 2009 WL 1586193, at *15. We agree with the district court's conclusion. "Title VII makes it unlawful for an employer to discriminate against an employee because she has 'opposed any practice made an unlawful employment practice,' or has made a charge or participated in an investigation or proceeding under the statute." *Alvarez*, 626 F.3d at 416 (quoting 42 U.S.C. § 2000e–3(a)). Specifically, Peeples must demonstrate that the protected conduct in which she engaged "was a determinative factor in the employer's materially adverse employment action." *Id.* "Because the factual record was fully developed in connection with the motion for summary judgment, we address directly whether [Peeples] has presented a genuine issue of material fact for trial on the ultimate question of discrimination *vel non*." *Id.* Thus, "[t]he key question here is whether [Peeples] presented sufficient evidence

to support a conclusion that [CRST's] proffered reason for [terminating] her was pretext for a retaliatory motive." *Id.*

Peeples failed to establish a fact issue that CRST's proffered reason for her termination was pretextual. CRST asserts that it discharged Peeples because newly diagnosed cervical cancer prevented her from working. The undisputed record reflects that she was unable to operate her truck under CRST's demanding team-driving regimen because of her frequent cervical bleeding and subsequent chemotherapy and radiation treatments. As support for her claim that CRST's reason was pretextual, she relies on a comment by Robin Knight, the replacement Lead Driver, that referred to Peeples as "his problem child." Additionally, Peeples relies on the temporal proximity of her discharge to her complaint, noting that CRST terminated her approximately one month after her complaint. This evidence supports mere speculation not a reasonable conclusion of pretext. With respect to the temporal proximity, we note that within a few days of Peeples leaving her harasser's truck, CRST granted her request for a female Lead Driver and immediately put her back out on the road. It is undisputed that on September 20, 2005, a Texas doctor issued a second opinion that her proper diagnosis was cervical cancer.

On these facts, the district court properly concluded that a reasonable jury could not conclude that CRST's proffered reason for terminating Peeples's employment was pretextual. Accordingly, we affirm the district court's grant of summary judgment on her Title VII and ICRA retaliation claims.

E. Attorneys' Fees

Finally, the EEOC contends on appeal that the district court abused its discretion by awarding CRST $4,467,442.90 in attorneys' fees and expenses, pursuant to 42 U.S.C. § 2000e–5(k) and 28 U.S.C. § 1920. "A *prevailing* defendant in a discrimination suit under Title VII of the Civil Rights Act of 1964 may recover attorneys' fees if the plaintiff's case was frivolous, unreasonable, or without foundation." *EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197, 198 (8th Cir. 1987) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)). "[W]e will grant prevailing party status to a Title VII defendant only in very narrow circumstances." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994). In light of our reversals of a couple of the district court's summary-judgment orders, CRST is no longer a "prevailing" defendant because the EEOC still asserts live claims against it. *See id.* ("Where there are disputed issues of fact, it is necessarily impossible to prove that a plaintiff's case is meritless shy of a full-blown trial on the merits which might reveal that the plaintiff's case was 'without foundation.' "). Accordingly, we will vacate, without prejudice, the district court's award of attorneys' fees and expenses pursuant to 42 U.S.C. § 2000e–5(k).

III. Conclusion

Based on the foregoing, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. Specifically, we reverse the district court's grant of summary judgment on the EEOC's

claims as to Monika Starke because the EEOC, suing as a plaintiff in its own name under § 706, may not be judicially estopped because of Starke's independent conduct.[30] Additionally, we reverse the district court's grant of summary judgment on the EEOC's claims on behalf of Tillie Jones because the EEOC has produced sufficient evidence to create a genuine fact issue as to the severity or pervasiveness of harassment that she allegedly suffered. Finally, we vacate, without prejudice, the district court's award of attorneys' fees to CRST because, in light of these aforementioned rulings, CRST is no longer a "prevailing" defendant under 42 U.S.C. § 2000e–5(k). We affirm the remainder of the district court's orders and remand for further proceedings consistent with this opinion.

MURPHY, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent from the majority's conclusion that the EEOC failed to fulfill its litigation prerequisites in this case and the resulting dismissal of trial worthy sexual harassment claims. The majority imposes a new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim. This rule places unprecedented obligations on the EEOC and in effect rewards CRST for withholding information from the Commission. In addition I dissent from the holding that CRST's lead drivers are not

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[30] See *supra* n.16 regarding our ultimate affirmance of the district court's grant of summary judgment to CRST as to Payne's and Timmons's claims.

supervisors of the women trainees assigned to their long haul trips. In other respects I join in the majority opinion.

The EEOC was drawn into this case by Monika Starke's charge that she was sexually harassed while employed by CRST. The Commission then asked CRST "whether any other individual has complained" about sexual harassment at the company. Although many women had reported harassment by trainers or codrivers during long haul trips, CRST furnished to the Commission only two names. The EEOC eventually discovered that several hundred women employees claimed severe sexual harassment by CRST male trainers or driving partners during extended over the road trips. Their allegations against the truck drivers included claims of sexual propositioning, sexual assault, and rape. As the EEOC's investigation continued, it learned that CRST had originally taken minimal action in response to the women's reports of harassment.

During the course of the Title VII prelitigation process, the EEOC put CRST on notice that it was investigating a class of women employees and requested the company's help in identifying class members. *See* 29 C.F.R. § 1601.15 (explaining EEOC's investigative authority). The Commission informed CRST that it had found "reasonable cause to believe that [the company had] subjected a class of employees and prospective employees to sexual harassment." *See* 42 U.S.C. § 2000e–5(b) (directing Commission to issue reasonable cause determination after investigation). Subsequently the EEOC gave CRST an opportunity to achieve voluntary compliance despite the company's

late response to the Commission's invitation to conciliate. *See id.* (stating that the Commission "shall endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion"). During the conciliation process the EEOC informed CRST that it did not have access to the number of class members or their names and needed the company's help to identify these individuals. CRST rejected this proposal, responding that the damage amount sought by Monika Starke made it "confident that conciliation will not result in a resolution of this matter." Thus unable to obtain cooperation from CRST, the EEOC proceeded with this lawsuit.

Neither Title VII nor our prior cases require that the EEOC conduct its presuit obligations for each complainant individually when litigating a class claim. Rather, we have required that the EEOC perform these duties for each ***type*** of Title VII violation alleged by the complainant. *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668–69 (8th Cir. 1992). Other circuit courts have similarly held that the "nature and extent" of the EEOC's investigation is beyond the scope of judicial review and that the EEOC need not separately conciliate individual class members when pursuing a class based sexual discrimination claim. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100–01 (6th Cir. 1984); *see also EEOC v. Rhone–Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989) (noting in ADEA case that EEOC need not conciliate individual class members); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237, 1245–46 (M.D. Ala. 2001) (noting that "[w]hat matters is

that EEOC served [the employer] notice that it was investigating possible discrimination against a class of women" and that the EEOC need not "conciliate each individual's Title VII claim separately").

The cases relied on by the majority are not to the contrary. They require only that the EEOC give the employer notice during the administrative process of the nature and scope of the claim, not of the names of each potential class member. For example, in *EEOC v. Jillian's of Indianapolis, Inc.*, the court allowed the EEOC to proceed on behalf of a local class even though it had not named each individual in the reasonable cause determination or conciliated individual class members because the employer had notice that the EEOC was investigating a local class. 279 F. Supp. 2d 974, 983 (S.D. Ind. 2003). It dismissed the nationwide class claims however because the employer had not had notice that the EEOC's investigation was national in scope. *Id.* Similarly, the court in *EEOC v. Dillard's Inc.* stated that the EEOC "is not required to identify every potential class member" before filing suit but permitted the EEOC to litigate only local class members' claims because the "scope of its pre-litigation efforts [was] limited" to one store location. No. 08-CV-1780, 2011 WL 2784516, at *6–8 (S.D. Cal. 2011).

The majority's new requirement that the EEOC separately investigate and conciliate each alleged ***victim*** of discrimination is inconsistent with the purpose of Title VII. Under this standard employers can avoid disclosure to the EEOC of complaining workers while the Commission is conducting its investigation and conciliation, then reveal the names

during court ordered discovery, and seek dismissal of the entire case on the ground of inadequate presuit efforts by the EEOC. This punishes the EEOC for employer recalcitrance and weakens its ability to enforce Title VII effectively. It also frustrates the underlying goal of the 1972 amendments intended to strengthen the EEOC's enforcement powers. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 325, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). The undesirable effects of a rule requiring the EEOC to investigate and conciliate each victim are illustrated in this case. The dismissal of scores of women claimants with apparent trial worthy claims is affirmed by the majority even though it was CRST which ended the conciliation process and even though the EEOC made substantial efforts to investigate and conciliate prior to filing its lawsuit.

While the majority justifies the dismissal by citing Title VII's emphasis on administrative resolution of disputes, here the EEOC made genuine efforts to resolve the dispute administratively and it was CRST that thwarted administrative resolution by providing the EEOC with incomplete information and rejecting its conciliation proposal. Given the EEOC's substantial presuit efforts, the district court's dismissal of trial worthy claims on the ground that the EEOC failed to complete its statutory duties should be reversed. At most, the case might have been stayed for further conciliation. *Cf. EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (finding summary judgment "far too harsh a sanction to impose on the EEOC even if the

court should ultimately find that conciliation efforts were prematurely aborted").

Finally, I respectfully disagree with the conclusion that the company's long haul trainers are not supervisors of the women trainees. In *Faragher v. City of Boca Raton*, the Supreme Court assumed that two employees were supervisors where they had been "granted virtually unchecked authority over their subordinates, directly controlling and supervising all aspects of [the alleged victim's] day-to-day activities." 524 U.S. 775, 808, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (internal quotations and punctuation omitted). It observed that the alleged victim had been "completely isolated" from her employer's higher management. *Id.* (citation omitted). Like the supervisors in *Faragher*, the CRST long haul trainers controlled almost all of a trainee's day to day activities, including when she was permitted to drive, when she could stop to use the bathroom, and when she could use the truck's satellite device to communicate with the outside world. The trainees were often confined in a truck for 28 consecutive days with their trainer who had authority to evaluate their progress and whose pass/fail rating was relied on by CRST in determining whether trainees would be promoted to full driver status. This unique environment facilitated the ability of certain trainers to make sexual propositions and demand sexual favors.

The tangible employment action cases cited by the majority involve situations where the harassers exercised less control over employment decisions than the trainers did in this case. *See Cheshewalla v. Rand*

& Son Const. Co., 415 F.3d 847, 851 (8th Cir. 2005) (harasser "may have consulted" with management on tangible employment action); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (termination decision based "in part" on alleged harasser's performance evaluation). Here, the lead drivers' pass/fail evaluations were relied on almost exclusively in deciding whether to promote a particular trainee. The fact that their promotion recommendations were nearly always followed weighs in favor of characterizing them as supervisors. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (assuming harasser was supervisor although his hiring and promotion decisions were "subject to the approval of his supervisor, who signed the paperwork"). The record reveals that even CRST's human resources director characterized the trainers as "really no different than ... supervisors."

The district court's analysis overlooked the practical reality created by the relationship between the trainer and the trainee in living and working together in the confined space of a truck over long routes and by the unusual level of control the trainers exercised over every aspect of the trainees' existence while on the road. The isolated work environment, trainees' extended time alone with the trainer, the lack of oversight from company management, the trainers' near total control over trainees' daily lives, and the trainers' substantial control over trainees' promotion chances are sufficient to categorize the trainers as supervisors. The cases cited by the majority on this subject dealt with quite different factual circumstances

not relevant to the unique factors present here. I would reverse the district court's ruling that none of the trainers were supervisors and the resulting dismissal of certain trainees' claims and remand those claims for consideration of whether CRST made out an *Ellerth–Faragher* affirmative defense.

I concur in the other parts of the majority decision, including the remand of the claims of Starke and Jones and the reversal of the unprecedented $4.5 million attorney fee award against the EEOC in favor of CRST. On remand any fee award against the EEOC should be closely considered since one should be made only in "very narrow circumstances." *E.g. Marquart v. Lodge 837*, 26 F.3d 842, 848 (8th Cir. 1994); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978); *EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 996 (8th Cir. 2006) (affirming denial of attorney fee award against EEOC despite employer contention that it failed to conciliate).

In sum, the dismissal based on the conclusion that the EEOC failed to fulfill its presuit duties should be reversed, as should the conclusion that none of CRST's trainers were supervisors. While this is admittedly a complex case, the court should still give effect to Title VII and ensure that the EEOC can fulfill its congressional mandate.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and BARBARA GRANT, CINDY MOFFETT, LATESHA THOMAS and NICOLE ANN CINQUEMANO,
Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC., Defendant.

No. 07-CV-95-LRR
August 13, 2009, Decided
August 13, 2009, Filed

JUDGES: LINDA R. READE, U.S. DISTRICT COURT CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

I. INTRODUCTION

The matter before the court is the Order to Show Cause (docket no. 233).

II. RELEVANT PRIOR PROCEEDINGS

A. Administrative Proceedings

In September of 2005, Monika Starke contacted Plaintiff Equal Employment Opportunity Commission ("the EEOC"). Starke was working as a new truck driver for Defendant CRST Van Expedited, Inc. ("CRST"). She complained to the EEOC that two of her male trainers ("lead drivers") sexually harassed her.

The EEOC asked Starke to fill out a questionnaire. In response to the EEOC's questions, Starke alleged that lead drivers Bobb Smith and David Goodman sexually harassed her. Starke disclaimed any knowledge of whether other female truck drivers were sexually harassed while working for CRST.[1]

On October 18, 2005, the EEOC assigned Investigator LaVonne Williams to Starke's case. Investigator Williams reviewed Starke's questionnaire and, on October 27, 2005, interviewed Starke. Investigator Williams drafted a formal charge of sex discrimination on Starke's behalf and mailed it to her.

1. Charge

On December 1, 2005, Starke presented the Charge of Discrimination ("Charge") (EEOC No.

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[1] Starke's unfamiliarity with the plight of her female coworkers is not surprising, because CRST's truck drivers generally work in isolated two-person teams in locations across the United States.

260-2005-06856) to the EEOC.[2] Starke alleged that CRST "discriminated against [her] on the basis of [her] sex (female) in that [she] was subjected to sexual harassment, in violation of Title VII of the Civil Rights Act of 1964, [*42 U.S.C. § 2000e et seq.*,] as amended" ("Title VII"). EEOC Ex. 1 ("Pl.'s Ex.") (docket no. 244-2), at 104. Starke alleged the following "particulars" in her Charge:

> I was hired by [CRST] on June 22, 2005 in the position of Truck Driver. Since my employment began with [CRST,] I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob[b] Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. "You got big tits for your size, etc . . ." I informed Bob[b] Smith that I was not interested in a sexual relationship with him. On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

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[2] The EEOC's records indicate Starke's allegations of sexual harassment were "[f]ormalize[d]" on December 1, 2005. EEOC Ex. 1 (docket no. 244-2), at 10.

Id. Further, Starke alleged that CRST "did not state why [she] was subjected to sexual harassment[,] which created a hostile work environment." *Id.*

Starke asked the EEOC to file her Charge and cross-file it with the Iowa Civil Rights Commission ("ICRC"). Pursuant to a work-sharing agreement, the EEOC formally received the Charge on behalf of both agencies and deemed the Charge to be "initially instituted" with the ICRC. (In the work-sharing agreement, the EEOC and ICRC reciprocally designated each other as agents for receiving charges of unlawful employment practices.) The EEOC sent a copy of the Charge to the ICRC, notified the ICRC that the Charge "is to be initially investigated by the EEOC," *id.* at 105, and began its formal investigation.[3]

2. Investigation

The EEOC ordered CRST to file a response to the Charge on or before December 30, 2005. Specifically, the EEOC asked for "a written position statement on

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[3] The ICRC waived its right to exclusive jurisdiction over charges initially instituted with it. For further explanation of the work-sharing agreement, *see Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 985-86 (N.D. Iowa 2003) (Bennett, C.J.). Because the EEOC deemed the Charge to be "initially instituted" with the ICRC, it was timely filed as to any alleged unlawful employment practice occurring on or after February 4, 2005, *i.e.*, any such practice occurring within 300 days of the filing of the Charge. 42 U.S.C. § 2000e-5(e)(1); *see, e.g., Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 360 n.8, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) ("If a charge has been initially filed with or referred to a state . . agency, it must be filed with the EEOC within 300 days after the practice occurred . . .").

each of the allegations of the [C]harge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge." *Id.* at 409. To this end, the EEOC sent CRST a "Request for Information" ("RFI"), in which it asked CRST "to submit information and records relevant to the [Charge]." *Id.* at 408.

The EEOC advised CRST that its investigation was limited to an eleven-month time frame. The EEOC stated: "The following dates are considered to be the 'relevant period' for the attached [RFI]: January 2, 2005–November 2, 2005." *Id.* Further, the scope of the EEOC's investigation was focused on Starke and not other women. Apart from asking CRST general questions about the nature of its business and its policies and procedures against sexual harassment, the RFI dealt only with Starke's allegations in the Charge.[4]

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[4] In relevant part, the EEOC asked for the following categories of information:

> 2. State whether [Starke] complained to any supervisor or manager regarding the conduct described in the [Charge]. If your answer is yes, identify the person or persons with whom the complaint was registered and describe each and every action taken by [CRST] in response to that complaint. Provide a copy of any written document which reflects the complaint and the action taken as a result of the complaint.
>
> 3. State whether any other individual has complained to any supervisor or manager concerning the conduct described in the [Charge]. If the answer is yes, please list the following:

On December 21, 2005, CRST sent the EEOC its "position statement" and provided all of the information that the EEOC sought in the RFI.[5] CRST "vehemently

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> a. name, sex, position, of individual placing the complaint,
>
> b. name, sex, position, of supervisor or manager, and
>
> c. any actions taken by [CRST] in response to the complaint.
>
> Provide a copy of any written document which reflects the complaint and the action taken as a result of the complaint.
>
> 4. Identify every individual who, to your knowledge, has information relevant to the allegations. For each such individual, provide the following:
>
> a. name, sex, position,
>
> b. whether a present or former employee (if applicable), and
>
> c. address and telephone number
>
> 5. Identify the other employees who worked with [Starke] during the relevant period. Include:
>
> a. name, sex, position,
>
> b. last known address and telephone
>
> Submit copies of daily assignment sheets, time cards, attendance and records for the individuals listed in # 5, including [Starke].

Pl.'s Ex. 1 at 429.

[5] Indeed, CRST provided more information than the EEOC requested. In response to the third category of information, CRST identified two other female drivers, Lori Essig and Tamara Thiel, as having filed formal charges of discrimination with the EEOC against CRST during the relevant time frame.

denie[d]" that it had discriminated against Starke on the basis of sex. *Id.* at 359. CRST told the EEOC that it had investigated Starke's complaints against Smith and Goodman.

In investigating Starke's complaint against Smith, CRST interviewed Smith, Frank Taylor and Madeline Lovins. Smith "admitted to making inappropriate comments while training Ms. Starke, but nothing physical." *Id.* at 360. "He said that was the way in which he trained." *Id.* Taylor, an eyewitness to some of the alleged sexual harassment, told CRST that Smith had made inappropriate comments towards Starke. When Taylor told Starke that Starke should not drive with Smith if she were uncomfortable, Starke ignored Taylor's advice. Lovins, one of Smith's other trainees, raved about Mr. Smith's abilities. Based on this investigation, CRST gave Smith a "final verbal warning" for making inappropriate comments to Starke and barred Smith from training or driving with women.

In investigating Starke's complaint against Goodman, CRST learned that, on August 3, 2005, Starke reported to CRST in a routine evaluation that Goodman had treated her "very well." *Id.* at 360. Further, Starke did not report the alleged harassment in a timely manner; CRST did not learn of Starke's allegations against Goodman until September 27, 2005, in a letter from one of her attorneys. When CRST confronted Goodman with Starke's allegations, Goodman responded that he and Starke had a consensual sexual relationship. Goodman's current co-driver, Timothy Walker, attested to such a relationship between Goodman and Starke. Walker had

listened to four "love messages" Starke had left on Goodman's voicemail. *Id.* at 361. CRST's investigation ended prematurely on September 30, 2005, when CRST fired Goodman for an unrelated reason.

In the ensuing months, the EEOC sent a series of supplemental RFIs to CRST. On March 1, 2006, Bloomer requested the following information from CRST on or before March 15, 2006:

> 1. Provide the full name, last known home address, last known home and cell telephone numbers, and social security number for all female drivers that drove with [Smith] and/or [Goodman] during their employment with [CRST].
>
> 2. State whether there were any other complaints of harassment made against either [Smith] and/or [Goodman] by any other female employees. If yes, provide all documentation relevant to these complaints, including: the complaint, who made the complaint (with contact information), position title of person making the complaint, who received the complaint and date received, who investigated the complaint, records of the investigation, and outcome of the complaint.
>
> 3. Provide a copy of all disciplinary records involving [Starke], [Smith], and [Goodman], including discharge paperwork.
>
> 4. Provide the last known home address, home and cell telephone numbers, and social security number for [Taylor] and [Lovins].

Id. at 351. On March 10, 2006, CRST provided information to the EEOC in response to the first supplemental RFI.

On June 21, 2006, the EEOC sent a second supplemental RFI to CRST. The EEOC requested that, on or before July 4, 2006, CRST provide the EEOC with three categories of information:

> 1. A complete copy of all documents relating to each of [Starke]'s complaints, verbal and written; including, but not limited to, notes on calendars, telephone contact notes, and all other documents, etc.
>
> 2. Provide a complete copy of [CRST]'s investigative documents relating to each of [Starke]'s complaints. This is [sic] includes, but is not limited to: original interview notes, original phone contact notes, related internal e-mails, etc.
>
> 3. Provide a complete copy of the discharge documentation for [Smith] and [Goodman] and state the specific reason for the discharge of each; include the name and position title of the person(s) that recommended the discharge and the name and position title of the person(s) that made the final discharge decision.

Id. at 347. On June 30, 2006, CRST provided information to the EEOC in response to the second supplemental RFI.

3. The investigation broadens to a "class"

As the foregoing RFIs demonstrate, the EEOC did not take CRST's denial of wrongdoing at face value but

instead conducted a lengthy investigation of Starke's allegations.[6] Investigator Pamela Bloomer, whom the EEOC assigned to Starke's case on or about February 24, 2006, interviewed various persons, including Starke, witnesses to Starke's alleged sexual harassment and former co-workers of Goodman and Smith. Investigator Bloomer exchanged correspondence and conversed over the telephone with James Barnes, CRST's Director of Human Resources, and attorneys for both Starke and CRST.

During the course of her investigation, Investigator Bloomer learned that four other female CRST truck drivers, Lori Essig, Rhonda Morgan,[7] Remcey Peeples[8]

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[6] Notwithstanding the EEOC's broad powers, it appears that the EEOC never issued any administrative subpoenas but instead wholly relied upon voluntary compliance from CRST. *Cf.* 42 U.S.C. § 2000e-9 (EEOC's subpoena powers); § 2000e-8(a) (same); *EEOC v. W. Publ'g Co.*, 502 F.2d 599, 603 (8th Cir. 1974) (holding that the EEOC "is entitled to have access to, for the purposes of examination and copying, all evidence which is relevant and material to the . . . charge's allegations that discrimination [occurred]"); *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 855 (9th Cir. 2009) (holding that an EEOC subpoena that sought information as to a "class" of allegedly aggrieved individuals was not overbroad simply because the EEOC's investigation was ultimately founded upon a single charge of discrimination), *petition for cert. filed*, 77 U.S.L.W. 3680 (Jun. 1, 2009) (No. 08-1500) [*cert. denied*, 130 S. Ct. 574, 175 L. Ed. 2d 382 (2009)].

[7] On November 9, 2005, Morgan filed a Title VII lawsuit against CRST. See generally *Morgan v. CRST Van Expedited, Inc.*, No. 05-CV-181-JAJ, 2007 U.S. Dist. LEXIS 7566, 2007 WL 402407 (N.D. Iowa Feb. 1, 2007). The case settled in March of 2007 after the court denied CRST's motion for summary judgment.

and Tamara Thiel, had filed formal charges of discrimination against CRST for alleged sexual harassment. On July 28, 2006, the EEOC sent a third supplemental RFI to CRST. The EEOC requested that, on or before August 8, 2006, CRST provide the EEOC with "a copy of all other [c]harges of [d]iscrimination that [CRST] has received in the past five years from any government agency that alleges sexual harassment." *Id.* at 316. The EEOC also asked for "the name, gender, home address, and home telephone number of all employees that were trained by either [Smith] and/or [Goodman]," including "the dates of the training and documentation of any complaints made against these two trainers by any of these trainees." *Id.* CRST provided information to the EEOC in response to the third supplemental RFI on July 31, 2006.[9]

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[8] On January 30, 2006, Peeples filed a charge of discrimination against CRST. Peeples alleged that her trainer, Robert Stanley, sexually harassed her while she worked for CRST and CRST then retaliated against her when she reported the sexual harassment. The sexual harassment and retaliation ended on or before September 7, 2005. The EEOC eventually assigned Investigator Bloomer to look into Peeples' charge.

[9] CRST sent the EEOC copies or partial copies of charges of discrimination for Linda Austin (filed 2001), Patrice Cohen (filed 2004), Lori Essig (filed 2005), Jessica Goodrich (filed 2004), Sharon Hatcher (filed 2004), Bruce Hutchings (filed 2002), Karen McCall (filed 2004), Maryann Redding (filed 2002), Tamara Thiel (filed 2005), Gail Whisby (filed 2005) and Imogene Wilkie (filed 2002). CRST also represented to the EEOC that "Smith had one complaint after . . Starke . . . which led to his termination." *Id.* at 313.

In January of 2007, Investigator Bloomer expressed concern to Barnes about "the conduct of CRST's male lead drivers when they are training female drivers." *Id.* at 241.

> Specifically, [Investigator Bloomer] stated that it seems the "mentality" is that it is acceptable for male lead drivers to exert power and influence over female students, which may create a hostile work environment for the female drivers. [Investigator Bloomer] also expressed concern regarding the number of complaints lodged against CRST based on alleged "sexual favors" that male lead drivers requested of female student drivers.

Id.

On January 19, 2007, Barnes sent a letter to Investigator Bloomer, in which he recounted their phone conversation and sought "to address the concerns [Investigator Bloomer] raised . . . related to the two sexual harassment complaints of Monika Starke and Remcey Peeples." *Id.* Barnes stated that the number of complaints of sexual harassment was "quite minimal" and not "quite high" as the EEOC was postulating. *Id.* Barnes stressed that, since December of 2005, CRST had delivered 4,715 loads with a male lead driver and a female trainee yet CRST only "was made aware of and investigated eight situations in which a female student alleged a male lead driver engaged in sexual harassment." *Id.* at 241-42. Barnes claimed that CRST took "[p]rompt remedial action designed to end the harassment" so that only one student had filed a complaint with the EEOC. *Id.* at

242. By Barnes' calculations, "only 1.3% of all female students who had a male lead driver had any kind of issue involving alleged sexual harassment." *Id.* Barnes also pointed out to the EEOC that CRST had taken certain measures to prevent sexual harassment. He urged the EEOC to find "no probable cause" in the Starke and Peeples matters. *Id.*

On March 22, 2007, the EEOC propounded a fourth supplemental RFI to CRST. In relevant part, the EEOC requested the following categories of information on or before April 17, 2007:[10]

> 1. Most recent home and cell (if known) telephone number(s), home address, position title, social security number, and dates of employment for: Timothy Walker, Bryan Holliman, Chris Sullivan, Jeff Frances, all dispatchers that worked at any time on July 14, 2005 through July 15, 2005, and all female drivers, including student drivers regardless of hire date, who were employed at any time from January 1, 2005 to the present. If any of these individuals are no longer employed, please state the reason and provide supporting documentation.
>
> 2. Complete personnel files for: [Smith], [Goodman], [Starke], Robert Stanley, [Peeples], Roger Hooper, Glen Minor, Rick Long, and [Morgan].

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[10] The deadline was originally April 10, 2007. CRST asked for and received a one-week extension from the EEOC.

> 3. For each female driver that began her employment on or after January 1, 2005 (including drivers that are no longer employed) state the dates of her training and the name(s), telephone number(s), home address, and social security number of the driver(s) she drove with during her training period and the dates on which she drove with each driver.
>
> 4. For each female driver, regardless of hire date, who was employed at anytime from January 1, 2005 to the present (including student drivers) state the name(s), telephone number(s), home address, and social security number of all of her co-drivers from the period of January 1, 2005 to the present and the dates she drove with each driver.

Id. at 216.

> On April 11 and 12, 2007, Barnes notified Investigator Bloomer that CRST would provide the EEOC with the first and second categories of information before the deadline. Barnes balked, however, at providing the EEOC with the third and fourth categories of information before the EEOC's deadline. Barnes characterized it as an "administrative nightmare." *Id.* at 213. Barnes pointed out that CRST had approximately 3000 drivers at any given time and suffered from an annual turnover rate of 150%. Barnes promised to immediately send the EEOC the first and second categories of information and to continue to work on

> compiling the third and fourth categories of information.

Investigator Bloomer "stated it would be O.K. to combine [the third and fourth categories of information and] just give me the requested info[rmation] on female employees . . . without having to make [a] distinction of who was [the] trainer [and] who was [the] co-driver." *Id.* at 213. Investigator Bloomer also granted CRST an extension to April 30, 2007 to provide the EEOC with the requested information.

On April 13, 2007, Thomas Wolle, one of CRST's attorneys, contacted Investigator Bloomer. Attorney Wolle wrote:

> [Y]ou have requested information which, generally, requires CRST to cull thousands of files and records pertaining to all female drivers. These requests are overly broad and burdensome, and would probably require the company to spend literally hundreds of hours trying to compile the information. Moreover, I fail to see how these requests (i.e., the names of all female drivers from January 1, 2005 to present, along with phone number, address, social security number, and a listing of all of the co-drivers and trainers of such female drivers) are pertinent to the [Charge], either standing alone or in conjunction with the complaint lodged against CRST by [Peeples], which I understand you are also investigating.
>
> * * *

> [W]hile CRST is agreeable to providing information which will assist the EEOC in its investigation of specific charges of harassment, the requests which you've made are overly broad and not reasonably related to the charges being investigated.

Id. at 211.

On April 26, 2007, Investigator Bloomer left a message for Attorney Wolle and informed him that "the remainder of the info[rmation was] still due on [April 30, 2007]." *Id.* at 209. Investigator Bloomer threatened to "issue a subpoena if [she did not] receive this info[rmation] from him by [April 30, 2007]." *Id.*

CRST did not provide the EEOC with the remainder of the requested information before April 30, 2007, but the EEOC did not issue an administrative subpoena. On May 4, 2007, Attorney Wolle called Investigator Bloomer and left a message in which he indicated that CRST still "want[ed] a narrower inquiry." *Id.* at 207. On May 11, 2007, Attorney Wolle and Investigator Bloomer had a telephone conversation, in which Attorney Wolle characterized the EEOC's request as "overly broad." *Id.* at 207. He promised to meet with CRST's management about the EEOC's request and get back to Investigator Bloomer on or before May 16, 2007.

On May 18, 2007, Attorney Wolle informed investigator Bloomer that CRST had agreed to provide the remainder of the requested information on or before May 30, 2007. On May 29, 2007, CRST mailed the

remainder of the requested information to the EEOC on a computer disc.[11]

4. Letter of Determination

On July 12, 2007, the EEOC issued a Letter of Determination to CRST. The Letter of Determination was encaptioned "*Monika Starke, Charging Party v. CRST International, Inc., Respondent.*" In relevant part, John P. Rowe, District Director of the EEOC, wrote:

> I have considered all the evidence disclosed during the investigation and find that there is reasonable cause to believe that there is a violation of [Title VII], as amended, in that [CRST] subjected [Starke] to sexual harassment on the basis of her gender. In addition, I find that there is reasonable cause to believe that [CRST] has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.
>
> * * *
>
> This determination is final. When the [EEOC] finds that violations have occurred, it attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, I invite the parties to join with the [EEOC] in reaching a just resolution of this matter. . . .

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[11] The parties did not provide the court with the disc. From the record presently before the court, it appears that the disc contained all of the information the EEOC requested.

> If [CRST] wishes to accept this invitation to participate in conciliation efforts, it may do so at this time by proposing terms for a conciliation agreement. That agreement should be provided to the [EEOC] representative within (14) days of the date of this determination. . . .
>
> Should [CRST] have further questions regarding the conciliation process or the conciliation terms it would like to propose, we encourage it to contact the assigned [EEOC] representative. Should there be no response from [CRST] within (14) days, we may conclude that further conciliation efforts in this matter would be futile or non-productive.

Id. at 22-23.

5. Conciliation

On August 6, 2007, Attorney Wolle informed Investigator Bloomer that CRST wished to participate in conciliation. On August 7, 2007, Attorney Wolle apologized to Investigator Bloomer for taking so long to respond to the EEOC's offer to conciliate. He then stated: "My client is interested in conciliation. Please contact me to schedule the same. Thank you." *Id.* at 16.

On August 8, 2007, Investigator Bloomer explained the EEOC's view of the conciliation process to Attorney Wolle in a voicemail message. Investigator Bloomer also asked Attorney Wolle to "[p]lease send . . . [CRST's] proposal by August 16, 2007[,] so that we can set up the meeting you requested." *Id.* at 17. Attorney Wolle responded and "indicat[ed] he wanted [the] EEOC to suggest a proposal for conciliation

instead of the other way around." Stipulation (docket no. 247-2), at 5.

On August 17, 2007, Attorney Wolle and Investigator Bloomer spoke on the telephone. Investigator Bloomer recounts their conversation as follows:

> We discussed several issues including [the] EEOC's request that a monitor be appointed to examine the employer's workplace to discover and eliminate sexual harassment, and relief for the class. He told me he wanted more information regarding the class. I was not able to provide names of all class members at that time, or an indication of the size of the class, but I believe I told him that [the] EEOC would require as part of conciliation that CRST send a letter to past and present employees to help identify class members so settlements could be paid to them.
>
> * * *
>
> Mr. Wolle told me on August 17, 2007 that he would think over [the] EEOC's proposal and would try to call me back.

Id.

On August 24, 2007, Attorney Wolle spoke to Investigator Bloomer on the telephone and "told [her] that he had spoken to [Starke's] counsel, that it did not appear conciliation would be successful, and that he would send a confirming email." *Id.* Investigator Bloomer told Attorney Wolle that "the next step after

conciliation would be [the] EEOC's internal decision whether to litigate on behalf of [Starke] and the class or provide [Starke] with a [right-to-sue] letter. *Id.*[12]

On August 27, 2007, Attorney Wolle emailed Investigator Bloomer. The subject of the email was "Monika Starke/CRST Van Expedited, Inc." *Id.* at 13. Attorney Wolle wrote the email "to confirm our phone conference . . . , in which I indicated that, in light of the monetary demand made by Ms. Starke's attorney . . . , CRST does not wish to engage in conciliation efforts because we are confident that conciliation will not result in a resolution of this matter." *Id.*

On August 28, 2007, the EEOC informed CRST that the EEOC had "determined that its efforts to conciliate [the Charge] as required by [Title VII] have been unsuccessful." *Id.* at 9. The EEOC stated that "further conciliation efforts would be futile or non-productive," indicated it would "not make further efforts to conciliate [the Charge]," and was "forwarding the case to our legal unit for possible litigation." *Id.*

B. Legal Proceedings

1. Complaint

On September 27, 2007, the EEOC filed the instant lawsuit on behalf of Starke "and a class of similarly situated female employees of [CRST] . . . ." Complaint (docket no. 2), at 1. Pursuant to Section 706 of Title VII, *42 U.S.C. § 2000e-5*, the EEOC brought suit in its own

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[12] On June 28, 2006, one of Starke's attorneys asked the EEOC for a right-to-sue letter. Pl.'s Ex. 1 at 119.

name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint ("EEOC's Complaint") (docket no. 8), at 1.[13] The EEOC generally alleges that Starke and the other similarly situated women "were adversely affected . . . when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them . . . ." *Id.* [14]

The heart of the EEOC's Complaint contains the following specific allegations against CRST:

> 7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of *Sections 703(a)* and *704(a)* of Title VII, *42 U.S.C. §§ 2000e-2* and *2000e-3*. Among other

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[13] The EEOC's Complaint, filed on November 16, 2007, corrected a typographical error in the Complaint. Ruling (docket no. 31), at 1 n.1.

[14] Notably, the EEOC did *not* allege that CRST was engaged in "a pattern or practice" of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII, *42 U.S.C. § 2000e-6*. Earlier in these proceedings, the court assumed the EEOC had the right to maintain a pattern-or-practice claim in this case but dismissed it with prejudice. The court held as a matter of law that there was insufficient evidence from which a reasonable jury could find that it was CRST's "standard operating procedure" to tolerate sexual harassment. Order (docket no. 197), at 57 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)).

things, two of its lead drivers subjected Starke to sexual harassment during their supervision of [her] (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.

8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including, among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.

> 9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive Starke and class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

EEOC's Complaint at 2-3. The EEOC alleges that CRST's actions "were intentional" and "done with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees." *Id.* at 3.

The EEOC asks the court for "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment [and] any other employment practice which discriminates on the basis of sex." *Id.* at 4. The EEOC further asks the court to "[o]rder CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices." *Id.* Finally, the EEOC asks the court to order CRST to pay Starke and the similarly situated female employees compensatory damages, punitive damages and ordinary costs. *Id.*

2. "The Great Unknown"

The Letter of Determination did not provide CRST with any notice as to the size of the "class of employees and prospective employees [subjected] to sexual harassment." Pl.'s Ex. at 22. Similarly, the EEOC's Complaint provides no indication of how many

"similarly situated female employees" the EEOC alleged to exist.[15] EEOC's Complaint at 3. In other words, it was unclear whether the instant Section 706 lawsuit involved two, twenty or two thousand "allegedly aggrieved persons." 42 U.S.C. § 2000e-5(f)(1).

In the initial stages of this case, it appeared the number of allegedly aggrieved persons was relatively small. On February 8, 2008, the court adopted the parties' Scheduling Order and Discovery Plan ("Scheduling Order") (docket no. 21). Among other things, the parties agreed to a December 7, 2008

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[15] The vague reference in the EEOC's Complaint to "Starke and a class of similarly situated female employees" added unnecessary confusion to this case in at least two other respects:

> First, the phrase "Starke and a class of similarly situated female employees" does not comport with the language or structure of Section 706, the statute under which the EEOC sued. *See* 42 U.S.C. § 2000e-5(f)(1) (referring to "[t]he person or persons aggrieved" and "the person aggrieved"). Such phrase naturally evokes the thought of Starke as the named plaintiff in a Rule 23 class action against CRST; to the contrary, it is settled that a Section 706 federal enforcement action bears little resemblance in practice to a Rule 23 class action. *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 333-34, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980); *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002) (Posner, J.).
>
> Second, the phrase "Starke and a class of similarly situated female employees" does not mirror the Letter of Determination. In the Letter of Determination, the EEOC found reasonable cause to believe that CRST "subjected [Starke] to sexual harassment on the basis of her gender" and "has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII."

deadline for completion of discovery and a trial ready date of May 15, 2009. The parties estimated that trial would last "20 days." Scheduling Order at 2 (emphasis in original). In reliance upon the parties' representations, the court scheduled trial to commence at some time "during the two-week period beginning on June 15, 2009" with the exact dates and times of the trial to be determined closer in time to the trial date. Trial Management Order (docket no. 22), at 1 (emphasis omitted).

As discovery progressed, however, it became clear that the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief. Instead, the EEOC was using discovery to find them. On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

On August 8, 2008, CRST asked the court to establish a date "by which [the] EEOC completes its identification of class members." Response (docket no. 38), at 4. The EEOC responded that it had identified "a total of 49 class members so far," predicted the "total class will reach between 100 and 150 individuals,"

indicated it believed it could identify "the bulk of the class members" by October 15, 2008, and suggested a December 7, 2008 deadline for identifying the "class members." Reply (docket no. 42), at 1-3.

On August 20, 2008, the court set a October 15, 2008 deadline for the EEOC "to disclose the identity of class members." Order Modifying Discovery Plan (docket no. 44), at 2. The court also continued the parties' previously agreed-upon discovery deadline to January 15, 2009.

By October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved persons to CRST. The number of "class members" greatly increased in the ten days immediately preceding the deadline. Prior to October 7, 2008, the EEOC had identified only seventy-nine "class members" to CRST. On October 7, 2008, the EEOC identified 40 new "class members" and advised CRST that the "[i]nvestigation is continuing." Seventh Supplement to Initial Disclosures (docket no. 243-5), at 1. On October 15, 2008, the EEOC identified 119 more "class members" and again advised CRST that the "[i]nvestigation is continuing." Eighth Supplement to Initial Disclosures (docket no. 243-6), at 1; Ninth Supplement to Initial Disclosures (docket no. 243-7), at 1; Tenth Supplement to Initial Disclosures (docket no. 243-8), at 1. Also on October 15, 2008, the EEOC partially identified 66 additional persons[16] and stated the "EEOC expects

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[16] The EEOC apparently did not know the addresses of any of these 66 women; indeed, the EEOC did not even know how to spell many of their names. The EEOC stated that it "understands that

[that] all [of] these individuals are class members. . . ." Eleventh Supplement to Initial Disclosures (docket no. 243-9), at 1. Again, the EEOC stated that the "[i]nvestigation is continuing." *Id.* at 1.

The total number of allegedly aggrieved persons identified or partially identified by the EEOC by October 15, 2008 was much greater than CRST had anticipated based upon the EEOC's prior representations to the court. *See, e.g.*, Response (docket no. 42), at 1-2 (EEOC estimating "the total class will reach between 100 and 150 individuals"); Scheduling Order at 2 (EEOC estimating a twenty-day trial). Therefore, on November 6, 2008, CRST filed a "Motion under *Rule 16(f)* for an Order to Show Cause Concerning the EEOC's Identification of Class Members" ("Motion to Show Cause") (docket no. 56). CRST alleged that the EEOC did not have a good-faith basis for naming so many allegedly aggrieved persons; CRST accused the EEOC of adopting a policy of "naming everyone and asking questions later" just before the October 15, 2008 deadline. Brief in Support of Motion to Show Cause (docket no. 56-2), at 10. CRST alleged that the EEOC had simply added a large number of names found in CRST's human resources files without ever speaking to those individuals. Further, the EEOC had indicated to CRST that it

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CRST has information relating to the addresses of these individuals" and "expressly reserves the right to amend this disclosure as investigation and discovery, including discovery into these individuals' potential claims, is conducted." Eleventh Supplement to Initial Disclosures (docket no. 243-9), at 1.

reserved unto itself the option in the future "to remove some women from this list at a later date." *Id.* at 11.

In ruling upon the Motion to Show Cause, the court held that the EEOC had complied with the letter, if not the spirit, of the court's order. The court took the EEOC at its word that it had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination. Recognizing that the EEOC is "the master of its own case" (in the sense that it has the statutory authority to proceed on behalf of allegedly aggrieved persons without their consent), *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002), the court declined to "strike" all women who had not given the EEOC informed consent to proceed on their behalf in this case. The court expressed concern, however, that "CRST [still] might unfairly face a 'moving target' of prospective plaintiffs as discovery winds down and trial approaches." Order (docket no. 66), at 8.

The court invoked its inherent case management authority, Fed. R. Civ. P. 26(f), Fed. R. Civ. P. 16(b) and LR 16, and adopted the following three rules to forestall any prejudice to CRST. The court ordered the EEOC to (1) immediately file with the court a corrected list of the approximately 270 allegedly aggrieved persons it had disclosed to CRST on October 15, 2008 (the list the EEOC previously disclosed contained many errors); (2) immediately inform CRST and file an amended disclosure list with the court as soon as it learned that it no longer wished to pursue individual claims on behalf of any of the women on the list; and (3)

make all allegedly aggrieved persons on whose behalf the EEOC sought relief available to CRST for a deposition before the conclusion of discovery on January 15, 2009. The court then ordered: "If the EEOC fails to make a woman available, as a discovery sanction the court will not permit her to testify at trial and will bar the EEOC from seeking relief on her behalf in this case." *Id.* at 9.

Subsequently, the EEOC made approximately 150 of the 270 allegedly aggrieved women available for deposition. Because the EEOC did not make the remainder of the women available to CRST for deposition prior to January 15, 2009, the court held that the EEOC could not seek relief for them.

In ruling upon a series of dispositive motions, the court examined the merits of most of the approximately 150 allegedly aggrieved persons' allegations. The court held that CRST could not be held liable for the allegations of the majority of these women, including Starke and Peeples, and barred the EEOC from seeking relief on their behalf at trial. At present, the EEOC intends to seek relief at trial on behalf of 67 allegedly aggrieved persons: Kierston Alleva, Tracy Ball, Stacy Barager, Pamela Barlow, Belinda Bedford, Mary Bender, Lillie Bingaman, Peggy Blake, Amber Blauvelt, Adda Brown-Lenzer, Deborah Carey, Kelli Carney, Diana Chester, Margaret Daniels, Darleaner Deese, Donna Dickson, Barbara Dixon, Nicole Edwards, Cynthia Fisk, Robryna Fitch, Yvonne Fortner, Marie Foster, Barbara Grant, Zelestine Grant, Martha Griffin, Sherri Halley, Wanda Hasbell, Catherine Heckman, Victoria High, Carolyn

Hunsucker, Lola Hutton, Sheila Jackson, Tequila Jackson, Diona Johnson, Angela Lesmeister, Tessa Medley, Patricia Merritt, Cindy Moffett, Valerie Montoya, Debra Moorer, Veronica Mora, Julie Noernberg, Bobbi O'Dell, Anya Owens, Kathleen Peterson, Carole Petitt, Margaret Rice, Shalitha Ross, Denise Roundtree, Mechelle Schuder, Jammie Scott, Cathy Shaw, Annette Smith, Gloria South, Latesha Thomas, Doris Tiberio, Joyce Toppin, Tracye Taylor, Tracy Tuttle, Ramona Villarreal, Rebecca Waisr, Barbara Wallace, Tiani Warden Thompson, Kimberly Watson, Rhonda Wellman, Tameisha Wilson and Pamela Wright-Hoffman.[17] The EEOC contends that these 67 women fall within the "class" in the Letter of Determination and the "class" in the EEOC's Complaint.

3. Order to Show Cause

On May 11, 2009, the EEOC filed a "Motion for Order to Show Cause Why Plaintiff EEOC's Section 706 Claims on Behalf of Allegedly Aggrieved Persons Should Not Be Dismissed for Failure to Exhaust Remedies" ("Motion") (docket no. 222-1). On May 15,

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[17] The court notes that, on April 3, 2007, the EEOC issued Foster a right-to-sue letter and stated that "the [EEOC] is unable to conclude that the information obtained establishes violations of the statutes." Def.'s Ex. 4 to Motion (docket no. 222-6), at 3. On December 27, 2007, the EEOC issued an identical letter to Bedford. *Id.* at 2.

2009, the EEOC filed a Resistance (docket no. 229-1) to the Motion.[18]

On May 18, 2009, the court granted the Motion and issued the Order to Show Cause. The court had "doubts about the EEOC's ability to pursue this matter in whole or in part at trial" in light of the Eighth Circuit Court of Appeals' statements in *EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992). In *Delight Wholesale*, the Eighth Circuit Court of Appeals stated:

> The permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge *or developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

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[18] On the same date, Plaintiffs-Interveners Barbara Grant, Cindy Moffett, Latesha Thomas and Nicole Ann Cinquemano and former Plaintiffs-Interveners Janet Boot and Remcey Jeunenne Peeples filed a Response (docket no. 230) to the Motion. The court agrees that the Motion "clearly does not address whether [these seven women] have met the preconditions to pursue their suits," Response at 4, and so the court does not discuss their claims here.

973 F.2d at 668-69 (emphasis added and citations omitted). The Eighth Circuit Court of Appeals held that certain claims not included in the original charge of discrimination were "properly before the district court" but stressed that the EEOC discovered the unincluded claims during a reasonable investigation of the charge, the unincluded claims were "clearly like or related to the substance of the EEOC charge," the "EEOC included the [unincluded claims] in its reasonable cause determination" and the "EEOC gave [the employer] an opportunity to conciliate [the unincluded claims]." *Id.* at 669.

On May 29, 2009, the parties filed their Exhibits (docket nos. 243, 244, 245 & 246), a Stipulation (docket no. 247-2) and an Allegedly Aggrieved Persons Chart (docket no. 247-1). On June 1, 2009, the court held a show cause hearing. Attorneys Brian C. Tyndall, Jean P. Kamp, Jeanne Bowman Szromba, Ann M. Henry and Nicholas J. Pladson represented the EEOC. Attorneys John H. Mathias, Jr., Robert T. Markowski, Sally K. Sears Coder and Kevin J. Visser represented CRST. On July 17, 2009, the parties filed an Amended Allegedly Aggrieved Persons Chart (docket no. 261).

The matter is fully submitted and ready for decision.

III. STATUTORY FRAMEWORK

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). "The Supreme Court has

determined . . . that sexual harassment 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' qualifies as [unlawful] sex discrimination under Title VII." *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 928 (8th Cir. 2008) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)).

Section 706 of Title VII, 42 U.S.C. § 2000e-5, authorizes the EEOC to bring suit in its own name to ferret out unlawful sexual harassment. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 324, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) (succinctly explaining, in the seminal § 706 case, that the EEOC "need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals"). Specifically, § 706 permits the EEOC to sue a private employer on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1).

The EEOC may file a § 706 lawsuit against a private employer, after the filing of a charge of unlawful employment discrimination with the EEOC, if the EEOC finds "reasonable cause" to believe the employer has violated Title VII and makes a good-faith attempt to settle the matter through conciliation. *Id.* In *Occidental Life Insurance Company of California v. EEOC*, the Supreme Court neatly explained:

> Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a

> federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 [or 300] days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing. The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." If the EEOC finds that there is reasonable cause it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." When "the Commission is unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge."

432 U.S. 355, 359-60, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) (footnotes, citations and alteration omitted).

The EEOC is "master of its own case" when bringing suits on behalf of allegedly aggrieved persons in a § 706 lawsuit. *Waffle House*, 534 U.S. at 291. For example, it may bring suit with or without the consent of the allegedly aggrieved persons. *Id.* at 291-92. Nonetheless, it is axiomatic that the EEOC stands in

the shoes of those allegedly aggrieved persons in the sense that it must prove all of the elements of their sexual harassment claims to obtain individual relief for them. Likewise, the full range of legal remedies available to individuals is generally available to the EEOC if the EEOC prevails on their behalf. The EEOC is entitled to equitable relief, 42 U.S.C. § 2000e-5(g), and it may also usually pursue compensatory and punitive damages, 42 U.S.C. § 1981a(a)(1).

Although a § 706 lawsuit must begin with a formal charge of discrimination, *Occidental Life*, 432 U.S. at 359, a § 706 lawsuit "is not confined to the specific allegations in the charge," *Delight Wholesale*, 973 F.2d at 668. While Section 706 does not expressly contemplate that the EEOC might bring suit as to matters not contained in a charge of discrimination, it is a judicially created doctrine that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Gen. Tel.*, 446 U.S. at 331 (citing *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976) and *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975)).[19] In other words, the EEOC's lawsuit

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[19] The plain language of *§ 706* contemplates that the "charge shall be filed by *or on behalf of the person aggrieved* within three hundred days after the alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1) (emphasis added). *Section 2000e-5* makes no exception for the EEOC, even though it clearly contemplates EEOC enforcement actions. To promote judicial and administrative economy, courts granted the EEOC the ability to use an individual charge of discrimination as "a jurisdictional springboard" without requiring the formality of multiple charges

may include "discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge." *Delight Wholesale*, 973 F.2d at 668.

The leeway afforded to the EEOC by this judicially created "reasonable investigation rule" is broad but not absolute. "The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination . . . developed during a reasonable investigation of the charge, *so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding. Id.* at 668-69 (emphasis added); *see also EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976) ("[T]he original charge is sufficient to support EEOC administrative action, as well as an EEOC civil suit, for any discrimination stated in the charge itself or discovered in the course of a reasonable investigation of that charge, *provided such additional discrimination was included in the EEOC 'reasonable cause' determination and was followed by compliance with the conciliation procedures of [Title VII].*" (Emphasis added.)). As long as the EEOC investigates, issues a reasonable cause determination for and conciliates the additional allegations of discrimination, the reasonable investigation rule is quite expansive. A noted treatise summarizes the state of the "reasonable investigation rule" as follows:

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of discrimination. *See, e.g., Gen. Elec.*, 532 F.2d at 364 (cited with approval in *Gen. Tel.*, 446 U.S. at 331).

> Thus, *subject to the investigation and conciliation requirements* . . . ., it has been held that the EEOC can bring an action alleging sex discrimination when the initial charge only alleged race discrimination, an action alleging classwide discrimination where the original charge only alleged discrimination against an individual, an action for discrimination occurring at other branches of the employer's operation than that where the charging party was employed, and an action to redress race discrimination in promotions, transfers, and terms and conditions of employment when the original charge alleged only discrimination in hiring and discharges.

4 Lex K. Larson, *Employment Discrimination* § 75.01[2][a], at 75-10 (2d ed. July 2008). (footnotes omitted, emphasis added).

As the italicized portions of the preceding paragraph make clear, the EEOC may not use the reasonable investigation rule to circumvent Title VII's "integrated, multistep enforcement procedure" of investigation, determination and conciliation as to the additional allegations of discrimination. *Occidental Life*, 432 U.S. at 355. "[T]here must be investigation and conciliation of a claim before it is litigated." *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984). While the reasonable investigation rule allows the EEOC to expand its *administrative proceedings* beyond the mere allegations in a charge, the EEOC may only bring a § 706 lawsuit to remedy allegations of discrimination it investigates, finds reasonable cause to

believe are true and attempts in good-faith to conciliate. *See, e.g.*, *EEOC v. Am. Home Prods.*, 165 F. Supp. 2d 886, 909 (N.D. Iowa 2001) (Bennett, C.J.) ("[E]ven where additional claims are like or reasonably related to the claims asserted in the original charge, and could be reasonably expected to grow out of the investigation of the original charge, the Eighth Circuit Court of Appeals requires a determination of reasonable cause *as to those claims* and the opportunity for conciliation before the EEOC may include those claims in its suit." (Emphasis in original.)); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1262 (D. Colo. 2007) ("[T]he finding that the EEOC is not closely bound to the specifics of the original charge does not mean that the EEOC may bring a civil action regarding any discrimination it uncovers in the course of an investigation. Instead[,] . . . the EEOC must give adequate notice to a defendant-employer of the nature of the charges against it, as well as an opportunity to resolve all charges through conciliation."); *see also EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (Posner, J.) ("The charge incites the investigation, *but if the investigation turns up additional violations the [EEOC] can add them to its suit.*" (Emphasis added.)); *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996) ("[The] EEOC may allege in a complaint whatever unlawful conduct it has uncovered *during the course of its investigation*, provided that there is a reasonable nexus between the initial charge and the subsequent allegations in the complaint." (Emphasis added.)); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("The [EEOC's] functions of

investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe Congress directed the [EEOC] . . . [to] institute such litigation before it makes a determination." (quoting *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974))), *aff'd*, 516 F.2d 1297 (3d Cir. 1975)); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003) ("[T]he eventual lawsuit must arise from the 'scope of the investigation.' Each step along the administrative path--from charge to investigation and from investigation to lawsuit--must grow out of the one before it.").

With respect to Title VII's conciliation requirement, "[n]othing less than a 'reasonable' effort to resolve with the employer the issues raised by the complainant will do." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003). "This effort must, at a minimum, make clear to the employer the basis for the EEOC's charges against it." *Id.* "Otherwise, it cannot be said that the [EEOC] has provided a meaningful conciliation opportunity." *Id.* "[C]onciliation is at the heart of Title VII." *Id.* A lawsuit is "a last resort." *Id.*

IV. ANALYSIS

It is not disputed that the EEOC was entitled to expand its investigation of Starke's Charge and consider whether CRST had tolerated the sexual harassment of other female drivers. The EEOC "ascertain[ed]" the allegations of a number of other female drivers, including Essig, Morgan, Peeples and Thiel, "in the course of a reasonable investigation of" Starke's Charge. *Gen. Tel.*, 446 U.S. at 331. These other

female drivers alleged sex "discrimination like or related to the substance of the allegations" in Starke's Charge and their allegations could "be expected to grow out of the investigation triggered by" Starke's Charge. *Delight Wholesale*, 973 F.2d at 668.

Furthermore, the court may not second-guess the EEOC's findings in the Letter of Determination that "there [was] reasonable cause to believe that there [was] a violation of [Title VII], as amended, in that [CRST] subjected [Starke] to sexual harassment on the basis of her gender" and "reasonable cause to believe that [CRST] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII." Pl.'s Ex. at 22. The court does not have jurisdiction to review the EEOC's "Case Log" for Starke's Charge for the purpose of making de novo reasonable cause findings. *See, e.g., Caterpillar*, 409 F.3d at 833 ("[Courts] have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the [EEOC's] investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable.").

> "That line of inquiry would deflect the efforts of both the court and the parties from the main purpose of this litigation: to determine whether [a defendant] has actually violated Title VII. Acceptance of [such a] theory would entitle every Title VII defendant to litigate as a preliminary matter whether EEOC had a reasonable basis for its determination . . . . [This determination] would effectively make every Title VII suit a two-step action: First, the

> parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action."
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> [N]othing in the legislative history of Title VII indicates that Congress intended such challenges. [I]t is one thing to require the EEOC to adhere to its statutorily mandated procedures, but quite another to unduly burden that agency with additional lengthy litigation. [T]he EEOC's reasonable cause determination does not adjudicate rights and liabilities; it merely places the defendant on notice of the charges against him. If the charge is not meritorious, procedures are available to secure relief, i.e.[,] a de novo trial in the district court.

KECO, 748 F.2d at 1100 (quoting *EEOC v. Chi. Miniature Lamp Works*, 526 F. Supp. 974 (N.D. Ill. 1981)).

That said, the case at bar is one of those exceptionally rare § 706 cases in which the record shows that the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint–let alone issue a reasonable cause determination as to those allegations or conciliate them. The record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case. As to the 67 allegedly aggrieved persons for whom the EEOC presently intends to seek relief at trial, the following facts are undisputed:

- The EEOC did not investigate the specific allegations of any of the 67 allegedly aggrieved persons until after the Complaint was filed. For example, the EEOC did not interview any witnesses or subpoena any documents to determine whether any of their allegations were true.

- The EEOC did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's "class" until after it filed the Complaint. Indeed, prior to filing the Complaint, CRST enquired as to the size of the "class" and the EEOC responded that it did not know.

- The EEOC did not make a reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint. Indeed, at the time the EEOC issued the Letter of Determination on July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons *had not yet been sexually harassed.* Indeed, most of these 27 women allege they were sexually harassed *after the instant lawsuit was filed.* Although 38 of the remaining 40 allegedly aggrieved persons allege they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint.[20] The EEOC used discovery in the instant lawsuit to find them.

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[20] The two exceptions are Shaw and Thomas. Shaw alleges that she was sexually harassed in February and March of 2006. Thomas alleges that she was sexually harassed in November and December of 2006.

- The EEOC did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved persons prior to filing the Complaint.

The EEOC cites no binding legal authority that allows it to do what it is attempting to do in this case, *i.e.*, bootstrap the investigation, determination and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons. The mere fact that Starke and a handful of other women allege they were sexually harassed while working for CRST provides no basis for the EEOC to litigate the allegations of 67 other women in this lawsuit.[21] To the contrary, when presented with analogous facts, the courts have largely resisted the EEOC's attempts to perfect an end-run around Title VII's statutory prerequisites to suit. *See, e.g.*, *EEOC v. Target Corp.*, No. 02-C-146, 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298 (E.D. Wis. May 16, 2007); *EEOC v. Outback Steakhouse of Fla., Inc.*, 520 F. Supp. 2d 1250, 1263-68 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 982-83 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc.*, 445 F. Supp. 985, 987-89 (W.D. Pa. 1978).

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[21] The court expresses no view as to whether the EEOC's investigation, determination and conciliation of Starke's Charge would be sufficient to support a pattern-or-practice lawsuit. *Cf. EEOC v. Dial Corp.*, 156 F. Supp. 2d at 934-44 (N.D. Ill. 2001) (permitting the EEOC to use discovery to find more victims of sexual harassment in a pattern-or-practice case).

Target is instructive. In *Target*, as here, the EEOC sought to seek relief in a § 706 action on behalf of an allegedly aggrieved person, James Daniels, who never filed a charge of discrimination against the defendant and whose allegations the EEOC did not investigate before filing its complaint in federal district court. 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298 at *2. It was undisputed that the EEOC did not learn of Daniels' allegations of discrimination against Target until after the lawsuit was filed. *Id.* Chief Judge Rudolph T. Randa of the United States District Court for the Eastern District of Wisconsin barred the EEOC from seeking relief on Daniels' behalf. Chief Judge Randa reasoned:

> The EEOC only learned of Daniels' . . . allegations during the course of discovery in this lawsuit. There is a clear distinction between "facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit." *Jillian's*, 279 F. Supp. 2d at 981. An EEOC complaint must be "the product of the *investigation* that reasonably grew out of the underlying charges." *Jillian's*, 279 F. Supp. 2d at 980 (emphasis added). The EEOC may not use discovery in the resulting lawsuit "as a fishing expedition" to uncover more violations. [W]alner, 91 F.3d at 971.
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> It is true that a "suit by the EEOC is not confined 'to claims typified by those of the charging party . . . and [the defendant] is mistaken to think that the EEOC's complaint

> must be closely related to the charge that kicked off the [EEOC]'s investigation." *[Caterpillar]*, 409 F.3d [at] 833[.] However, *Caterpillar* also states that: "'Any violations that the EEOC ascertains *in the course of a reasonable investigation* of the charging party's complaint are actionable.'" *Caterpillar*, 409 F.3d at 833 (quoting [*Gen. Tel.] Co. v. EEOC*, 446 U.S. [at 331])) (emphasis added). Applying that standard, it is clear that the alleged violations with respect to Daniels were not discovered by the EEOC in the course of its investigation into [a charging party's] complaint.

Target, 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298, at *3 (emphasis in *Target*). The court adopts this portion of Judge Randa's analysis in full.[22] What happened in the case at bar is similar to what happened in *Target*. It is the opposite of what happened in *Delight Wholesale*, wherein the Eighth Circuit Court of Appeals pointed out that the "EEOC gave [the defendant] an opportunity to conciliate all three allegations [at issue in the lawsuit]. Thus, all three claims were properly before the district court." 973 F.2d at 669.

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[22] The court declines to follow *Target*'s additional statement that the "EEOC charge and the complaint must, at a minimum, describe the same conduct and implicate the same individuals." *Id.* at 2 (citation and internal quotation marks omitted). This statement is inconsistent with *Delight Wholesale*.

To rule to the contrary would severely undermine if not completely eviscerate Title VII's "integrated, multistep enforcement procedure," *Occidental Life*, 432 U.S. at 355, expand the power of the EEOC far beyond what Congress intended and greatly increase litigation costs. As counsel for CRST observed at the show cause hearing:

> Congress could not possibly have intended . . . to enfranchise [the EEOC] to use what amounts to weapons rather than a genuine process . . . . [T]here's a process that's in place according to statute. There can't possibly be empty formalism.
>
> Congress could not possibly have intended that simply by naming one person, you can then thereafter file a lawsuit and then figure out where you're going to go from there and impose this incredible expense that's been imposed on us, on defense, just to get to the point where [we know how many allegedly aggrieved persons on whose behalf the EEOC seeks relief].

Transcript (docket no. 254), at 9. To accept the EEOC's view of its own authority would also impose an untenable burden upon the federal district courts, as the EEOC might avoid administrative proceedings for the vast majority of allegedly aggrieved persons.

> [Yet] Congress could not possibly have intended that our federal district courts be burdened with the task of conducting mass trials of Title VII sexual harassment claims before a single jury absent some specifically charged unlawful

> practice commonly affecting all such claims, particularly when few of the claims were identified during the administrative process which Congress intended to act as a filter before any claims reached a federal court. Instead, [the] EEOC should be required to satisfy the conditions precedent of charging, investigating, finding reasonable cause, and conciliating each such unrelated claims before filing suit.

Brief in Support of Motion (docket no. 222-2), at 13.[23]

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[23] The observations of one commentator proved prophetic in the case at bar. The commentator wrote:

> By allowing claims not investigated in good faith to proceed to trial, mildly unfavorable employment decisions may become the subject of formal EEOC charges. . . . This may realistically equate to more frivolous suits reaching the courts. . . . Permitting the [EEOC] to circumvent its requirements can only broaden the number and scope of issues litigated, which, in turn, increases the time and expense of discovery and trials. Ultimately, when the EEOC only does enough to satisfy the "conciliation checkbox," the opportunity for mediation, arbitration or settlement and the quality of judicial decisionmaking is potentially diminished because more cases will require formal adjudication.
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> * * *
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> Title VII is a remedial statute created to 'further promote equal employment opportunities for American workers, and, as such, it is construed in favor of the complainant. Congress recognized that the judicial system is not always the most efficient or best medium for resolving employment disputes; therefore, the [EEOC] should only take a matter to trial if conciliation 'proves to be impossible.' . . . Congress gave substantial weight to the

The EEOC stresses that CRST knew or should have known many other women were complaining of sexual harassment and would continue to complain of sexual harassment after the EEOC filed this lawsuit. Even the most recalcitrant employer who flouts Title VII's prohibitions against unlawful employment discrimination, however, is due the process that Title VII mandates. *Cf. EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974) ("We agree with the court below that the regulation affords even the most uncooperative and recalcitrant respondent 'the right to be told that it has one last chance to attempt conciliation.'"). Congress surely did not intend that employers, even ones whose workplaces might be rife with sexual harassment, face the moving target of allegedly aggrieved persons that CRST faced in both the administrative and legal phases of this dispute.

The EEOC's failure to investigate the claims of the 67 allegedly aggrieved persons deprived CRST of a meaningful opportunity to engage in conciliation and foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit. The EEOC's insistence that the 67 allegedly aggrieved persons for whom it now seeks relief are truly part of the "class" of persons it referenced in the Letter of Determination is not well taken. This argument does nothing more than trade on

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premise that the EEOC would have to investigate and seek voluntary compliance before developing a lawsuit.

Anthony P. Zana, *A Pragmatic Approach to EEOC Misconduct: Drawing a Line on Commission Bad Faith in Title VII Litigation*, 73 Miss. L. J. 289, 316-17, 320-21 (2003).

the inherent ambiguity in the term "class" to the EEOC's own advantage. *Cf. Outback Steakhouse*, 520 F. Supp. 2d at 1267 ("Defendants had every reason to believe that the 'class' the EEOC was referring to in its determination was a *regional* class."); *Jillian's*, 279 F. Supp. 2d at 982-983 (finding the EEOC attempted to use the indeterminate term "class" in a letter of determination to impermissibly expand a regional administrative investigation into a nationwide lawsuit). Even if the court assumes that the EEOC need not identify each and every allegedly aggrieved person before filing a lawsuit, the EEOC's vague reference to a "class" in the Letter of Determination may only be understood in the context of the scope of the investigation that the EEOC actually conducted. The EEOC certainly may not simply issue a vague letter of determination as a predicate to meaningful conciliation. "It is, after all, *the EEOC's duty* to put Defendants on notice of the scope of the charges against them in order to give every incentive and allowance for settlement of the claims prior to filing the suit in court." *Outback*, 520 F. Supp. 2d at 1267 (emphasis in original); *see also Asplundh*, 340 F.3d at 1260 ("[A]t a minimum, [the EEOC must] make clear to the employer the basis for the EEOC's charges against it. Otherwise, it cannot be said that the [EEOC] has provided a meaningful conciliation opportunity." (Citation omitted.)). Here, Attorney Wolle unsuccessfully implored the EEOC to give CRST more information about the size of the "class."

In sum, the court is unpersuaded that CRST knew or should have known during the administrative phase of this dispute that it would need to defend against the allegations of the 67 allegedly aggrieved persons in the instant lawsuit. *Cf. Jillian's*, 279 F. Supp. 2d at 982 ("We are unpersuaded by the EEOC's evidence that [the defendant] knew or should have known that it was subject to a nationwide class action, since virtually all of that evidence is the product of discovery that occurred after it closed its investigation and filed its lawsuit."). *Id.* Because the EEOC did not investigate, issue a reasonable cause determination or conciliate the claims of the 67 allegedly aggrieved persons, the court shall bar the EEOC from seeking relief on their behalf at trial and dismiss the EEOC's Complaint. *See, e.g., Pierce Packing*, 669 F.2d at 608 ("Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC[.]"); *EEOC v. Am Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981) (same); *Outback*, 520 F. Supp. 2d at 1268 n.1 ("The EEOC does not contest that proper notice to a defendant-employer of the charges against it is a jurisdictional prerequisite to the EEOC filing suit against that employer."). *cf. Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 524-25 (5th Cir. 1980) (discussing the EEOC's "condition precedents" to suit).[24]

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[24] Had the EEOC not wholly abdicated its role in the administrative process, the court might have stayed the instant action for further conciliation in lieu of dismissal. *Compare EEOC v. Golden Lender Fin. Group*, 2000 U.S. Dist. LEXIS 4750, 2000 WL 381426, *5-*6 (S.D.N.Y. Apr. 13, 2000) (staying case because

Here, dismissal is a severe but appropriate remedy. Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's "integrated, multistep enforcement procedure." *Occidental Life*, 432 U.S. at 355. It would ratify a "sue first, ask questions later" litigation strategy on the part of the EEOC, which would be anathema to Congressional intent.[25]

"it cannot be said that the EEOC has made absolutely no efforts to conciliate"), *with EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1256 (M.D. Ala. 1989) ("[T]he weight of the authority seems to be that the total failure to conciliate is a bar to suit by the EEOC.").

[25] The court expresses no view as to whether the trial attorneys for the EEOC acted in bad faith. The court notes that, upon filing the Complaint, the EEOC's higher-level attorneys issued a press release entitled "**TRUCKING GIANT CRST SUED FOR SEXUAL HARASSMENT OF FEMALE 'TEAM' DRIVERS.**" Mr. John Hendrickson, Regional Attorney for the Chicago District, and Mr. John P. Rowe, District Director of the Chicago District Office, commented on CRST's alleged practices. Def.'s Ex. 5 (docket no. 222-7), at 2 (emphasis in original). For example, Mr. Hendrickson stated: "This situation is chilling to contemplate: being trained by a sexual harasser on the open road in a sleeper cab, and not getting immediate help when you complain. We think the repetitive nature of the situation as alleged here makes this case especially compelling . . . ." *Id.* at 3. Mr. Hendrickson also attended an employment law conference in Chicago on October 1, 2008, in which he "highlighted the rampant sexual harassment exhibited by trucking giant CRST and their weak, if typical, defense that it was 'all the woman's fault.'" Def.'s Ex. 3 (docket 243-3), at 1. In *Asplundh*, the Eleventh Circuit Court of Appeals affirmed the dismissal of an EEOC enforcement action and an award of attorneys' fees against the *EEOC*. 340 F.3d at

The court cannot ignore the law as it is written by Congress and construed by the Eighth Circuit Court of Appeals in *Delight Wholesale.*

The government, like its citizens, must follow the law. The EEOC must respect Title VII's administrative scheme and follow the "clearly delineated paths to justice" that Congress has created. *Cf. Langbord v. U.S. Dep't of Treasury*, 645 F. Supp. 2d 381, 2009 U.S. Dist. LEXIS 66299, 2009 WL 2342638, *15 (E.D. Pa. 2009). "Seeking shortcuts to these paths does nothing more than undermine their valuable function and erode the meaning of the rights they are designed to protect." *Id.* "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961) (Black, J., dissenting) (quoted in *Langbord*, 2009 U.S. Dist. LEXIS 66299, 2009 WL 2342638, at *15).

V. CONCLUSION

IT IS THEREFORE ORDERED:

(1) The court **BARS** the EEOC from seeking relief at trial in this case on behalf of Kierston Alleva, Tracy Ball, Stacy Barager, Pamela Barlow, Belinda Bedford, Mary Bender, Lillie Bingaman, Peggy Blake, Amber Blauvelt, Adda Brown-Lenzer, Deborah Carey, Kelli

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1261. The Eleventh Circuit Court of Appeals opined that the EEOC may have avoided conciliation to make headlines and press its case against the employer in the media. *Id.*

Carney, Diana Chester, Margaret Daniels, Darleaner Deese, Donna Dickson, Barbara Dixon, Nicole Edwards, Cynthia Fisk, Robryna Fitch, Yvonne Fortner, Marie Foster, Barbara Grant, Zelestine Grant, Martha Griffin, Sherri Halley, Wanda Hasbell, Catherine Heckman, Victoria High, Carolyn Hunsucker, Lola Hutton, Sheila Jackson, Tequila Jackson, Diona Johnson, Angela Lesmeister, Tessa Medley, Patricia Merritt, Cindy Moffett, Valerie Montoya, Debra Moorer, Veronica Mora, Julie Noernberg, Bobbi O'Dell, Anya Owens, Kathleen Peterson, Carole Petitt, Margaret Rice, Shalitha Ross, Denise Roundtree, Mechelle Schuder, Jammie Scott, Cathy Shaw, Annette Smith, Gloria South, Latesha Thomas, Doris Tiberio, Joyce Toppin, Tracye Taylor, Tracy Tuttle, Ramona Villarreal, Rebecca Waisr, Barbara Wallace, Tiani Warden Thompson, Kimberly Watson, Rhonda Wellman, Tameisha Wilson and Pamela Wright-Hoffman.

(2) The EEOC's Complaint (docket no. 8) is **DISMISSED.**

(3) The EEOC shall pay CRST's ordinary costs.

(4) CRST may file its request for costs **10 court days** after the disposition of the entire case.

(5) Now that CRST is a "prevailing party" as to the EEOC, 42 U.S.C. § 2000e-5(k), CRST may file an application for attorneys' fees from the EEOC within **20 court days** after disposition of the entire case.

(6) Formal judgment shall not enter against the EEOC and in favor of CRST until the court enters

judgment on the pending claims of the remaining Plaintiffs-Interveners.

IT IS SO ORDERED.

DATED this 13th day of August, 2009.

/s/ Linda R. Reade

LINDA R. READE

CHIEF JUDGE, U.S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 13-3159

Equal Employment Opportunity Commission

Appellant

v.

CRST Van Expedited, Inc.

Appellee

Appeal from U.S. District Court for the
Northern District of Iowa – Cedar Rapids
(1:07-cv-00095-LRR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 20, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

No. 14-1375

In the Supreme Court of the United States

CRST VAN EXPEDITED, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to award petitioner attorney's fees under 42 U.S.C. 2000e-5(k) based on the Equal Employment Opportunity Commission's failure to sufficiently investigate and conciliate before filing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 774 F.3d 1169. The opinion of the district court (Pet. App. 33a-85a) is unreported but is available at 2013 WL 3984478. An earlier relevant opinion of the court of appeals (Pet. App. 86a-163a) is reported at 679 F.3d 657.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2014. A petition for rehearing was denied on February 20, 2015 (Pet. App. 218a). The petition for a writ of certiorari was filed on May 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits an employer from discriminating in employment on the basis of sex. 42 U.S.C. 2000e-2(a)(1). The Equal Employment Opportunity Commission (EEOC or Commission) enforces the statute's prohibition on unlawful employment practices through investigation and litigation. A person claiming to be aggrieved or an EEOC member may file a charge of unlawful employment discrimination with the EEOC. See 42 U.S.C. 2000e-5(b). The EEOC then investigates, and if it determines that there is not reasonable cause to support the charge, it dismisses the charge and notifies the parties. *Ibid.* At that point, the complainant may file his or her own lawsuit. 42 U.S.C. 2000e-5(f)(1).

If the EEOC finds reasonable cause to believe that the charge is true, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If the EEOC "has been unable to secure from the respondent a conciliation agreement acceptable to [it]," the EEOC may sue to seek relief for the aggrieved individual. 42 U.S.C. 2000e-5(f)(1). As this Court recently explained, a court "may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit," but "the scope of that review is narrow" because the EEOC has "extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015).

Title VII authorizes a court, in its discretion, to award attorney's fees to a prevailing party (other than

the EEOC or the United States). 42 U.S.C. 2000e-5(k). In *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), this Court held that a prevailing Title VII defendant is entitled to fees only where the plaintiff's claim was "frivolous, unreasonable, or groundless," or "the plaintiff continued to litigate after it clearly became so." *Id.* at 422.

2. Petitioner is an interstate trucking service that employs more than 2500 drivers. Pet. App. 88a. It uses team driving for long-haul assignments, where two drivers alternate between sleeping and driving, for up to 21 days together. *Ibid.* Petitioner provides newly-hired drivers with a short classroom orientation and then pairs them with an experienced driver (the lead driver) for 28 days of over-the-road training. *Id.* at 88a-89a. At the end of that training period, the lead driver gives the trainee a "pass/fail driving evaluation" to determine if the trainee should be certified as a "full-fledged CRST driver." *Id.* at 89a.

In December 2005, a former CRST driver-trainee filed a charge of sex discrimination with the EEOC. Pet. App. 90a. She alleged that the two lead drivers petitioner assigned to train her sexually harassed and sexually assaulted her during her over-the-road training. *Id.* at 90a-91a. In particular, she alleged that one lead driver constantly made sexual remarks to her during her training, and the other lead driver forced her to have unwanted sex in order to receive a passing grade. *Id.* at 91a.

The EEOC investigated the complaint. Pet. App. 91a-94a. During its investigation, the EEOC learned that numerous other female drivers and trainees had complained to petitioner of sexual assault and sexual harassment by male trainers or co-drivers during

over-the-road training or long-haul driving assignments. *Id.* at 92a-93a, 173a-175a. The EEOC sent petitioner a letter explaining that it had found reasonable cause to believe that petitioner had discriminated on the basis of sex against the complainant and "a class of employees and prospective employees." *Id.* at 180a. In that letter, the EEOC invited petitioner to conciliate the claim. *Id.* at 180a-181a.

From July through August 2007, the EEOC attempted to obtain petitioner's voluntary compliance through conciliation. Pet. App. 94a-95a; see 42 U.S.C. 2000e-5 (providing that when the EEOC determines after investigation "that there is reasonable cause to believe" the charge of discrimination, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion"). An EEOC representative had several phone calls with petitioner's attorney, discussing possible conditions of settlement. Pet. App. 181a-182a. But then petitioner's attorney cut off conciliation, explaining to the EEOC representative that, based on the complainant's monetary demands, "CRST does not wish to engage in conciliation efforts because we are confident that conciliation will not result in a resolution of this matter." *Id.* at 182a-183a. The EEOC sent petitioner a letter confirming that conciliation had failed. *Id.* at 183a.

3. The EEOC sued petitioner in federal district court, contending that the complainant and "a class of similarly situated female employees" had been sexually harassed and subjected to a hostile work environment by male lead drivers or co-drivers. Pet. App. 95a (quoting complaint). The complaint alleged that petitioner failed "to prevent, correct, and protect" female

trainees and drivers from sexual harassment and a hostile work environment in violation of Title VII. *Id.* at 96a (quoting complaint). The EEOC's lawsuit sought "to correct [petitioner's] unlawful employment practices on the basis of sex" and to provide relief to the class of female CRST employees "who were adversely affected by such practices." *Id.* at 95a (quoting complaint). The district court permitted the complainant and five other women to intervene in the suit. *Id.* at 2a.

The parties engaged in discovery. Pet. App. 187a-188a. After completion of discovery, the EEOC identified and produced for deposition 154 claimants for whom petitioner was liable for sexual harassment by a lead driver or co-driver. *Id.* at 10a-11a. Petitioner filed several motions for summary judgment (on statute-of-limitations, judicial estoppel, and other grounds). *Id.* at 3a-6a. As a result of its rulings on those motions, the district court reduced the number of EEOC claimants with trial-worthy allegations to 67 women. *Id.* at 6a.

Petitioner moved to dismiss the complaint with respect to all remaining claimants on the ground that the EEOC failed to investigate, make reasonable cause determinations, and attempt conciliation with respect to each individual claimant. Pet. App. 6a-7a. The district court agreed and dismissed the complaint on the ground that the EEOC failed to sufficiently investigate and conciliate each of the individual claims. 07-CV-95-LRR Order 31-39 (N.D. Iowa Aug. 13, 2009) (Docket entry No. 263).

Petitioner sought approximately $7.6 million in attorney's fees and more than $1 million in expenses and costs. 07-CV-95-LRR Order 4-5 (N.D. Iowa Feb. 9,

2010) (Docket entry No. 320). The district court awarded petitioner $4.5 million in attorney's fees based on the EEOC's "failure to investigate and attempt to conciliate" as to the 67 claimants. *Id.* at 14-15, 39.

4. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 86a-163a. The court affirmed dismissal of the EEOC's claim as to the 67 claimants for failure to sufficiently investigate and conciliate with respect to each of them. *Id.* at 103a. The court acknowledged that the EEOC's investigation had revealed that a number of female drivers had been sexually harassed, and it declined to second-guess the EEOC's finding that "reasonable cause existed to believe that [petitioner] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII." *Id.* at 106a (second set of brackets in original; citation and internal quotation marks omitted). But the court concluded that the EEOC should have identified all possible claimants during its investigation and attempted conciliation with respect to each one of them (even though petitioner had cut off conciliation completely after deciding it would not settle the complainant's claim). *Id.* at 106a-114a. The court also concluded that dismissal, rather than a stay, was the appropriate remedy. *Id.* at 115a-116a. Judge Murphy dissented from those rulings, explaining that the court was wrong to affirm dismissal of the EEOC's claims on the ground that the EEOC failed to identify and conciliate with respect to each alleged victim of discrimination. *Id.* at 156a-161a (Murphy, J., concurring in part and dissenting in part).

The court of appeals separately concluded that the district court had erred in granting summary judgment for petitioner with respect to two claimants. See Pet. App. 123a-128a, 138a-142a. On that basis, the court determined that petitioner was no longer a prevailing defendant and vacated the award of attorney's fees without prejudice. *Id.* at 155a-156a.

The EEOC filed a petition for rehearing en banc, which was denied. 09-3764 Order 1-3 (8th Cir. June 8, 2012).

5. On remand, the EEOC and petitioner reached a settlement agreement and jointly sought dismissal of the case. Pet. App. 47a-48a. The district court dismissed the case. *Id.* at 48a.

The district court then granted petitioner's renewed motion for attorney's fees, awarding petitioner $4.2 million in attorney's fees and approximately $500,000 in expenses and costs. Pet. App. 33a-85a. The court recognized that a defendant may obtain attorney's fees under Title VII only when there has been "a judicial determination of the plaintiff's case on the merits" and "the plaintiff's claim is frivolous, unreasonable or groundless." *Id.* at 52a (citation and internal quotation marks omitted). But the court decided that its decision to dismiss the EEOC's claims "due to the EEOC's failure to satisfy its pre-suit obligations" is "a dismissal on the merits of the EEOC's claims" because satisfying the pre-suit obligations is "an additional element of a claim to relief." *Id.* at 58a-59a. The court also concluded that the EEOC's consistent contention that it did not have to conciliate for each individual victim was "frivolous, unreasonable or groundless," *id.* at 64a, and the court so concluded even though Judge Murphy in dissent had *agreed* with

the EEOC's argument in this very case. See p. 6, *supra* (citing Pet. App. 156a-161a); Pet. App. 61a (noting the EEOC's argument).

6. The court of appeals reversed and remanded. Pet. App. 1a-32a. As relevant here, the court concluded that petitioner cannot obtain attorney's fees based on the EEOC's failure to sufficiently investigate or conciliate because there was no judicial determination of the merits of the sex discrimination claim. *Id.* at 18a-24a & n.4. The court explained that, under this Court's decision in *Christiansburg*, a defendant may not obtain attorney's fees unless the court finds that the "plaintiff's case is frivolous, unreasonable, or groundless," and such a finding "is not possible without a judicial determination of the plaintiff's case on the merits." *Id.* at 18a (citation omitted). The court explained that the EEOC's duty to investigate and conciliate are "nonjurisdictional preconditions" to suit, not "elements of the [Title VII] claims." *Id.* at 22a. These "presuit obligations" "do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII"; instead, they "provide[] employers an opportunity to resolve the dispute in lieu of litigation." *Id.* at 23a. The court likened these administrative requirements to "the [Copyright Act's] registration requirement," which this Court held is a "non-jurisdictional precondition to filing suit, as opposed to an element of the claim." *Id.* at 21a-22a (citing *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 165-166 (2010)).

The court of appeals remanded for the district court to reconsider whether to award fees for the claims that had been decided on their merits on summary judgment and for the court to reconsider the

award of attorney's fees on appeal using the correct legal standards. Pet. App. 27a-32a.[1]

7. After the court of appeals' decision, this Court decided *Mach Mining*, *supra*, clarifying that the EEOC has "wide latitude over the conciliation process" under Title VII, subject only to "relatively barebones" judicial review. 135 S. Ct. at 1652, 1656. The Court also held that, if the EEOC fails to engage in sufficient conciliation, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance," not to dismiss the case. *Id.* at 1656.

ARGUMENT

Petitioner contends (Pet. 11-24) that the court of appeals erred in declining to award it attorney's fees based on the EEOC's failure to investigate and conciliate with respect to each alleged victim before filing this Title VII class-action suit. The court of appeals' conclusion is correct, and there is no disagreement in the circuits on the question presented. Indeed, this Court's recent decision in *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), confirms the correctness of the court of appeals' ruling. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that petitioner cannot obtain attorney's fees under 42 U.S.C. 2000e-5(k) based on a ruling that the EEOC failed to sufficiently investigate and conciliate because that ruling was not a determination of the merits of the sex-discrimination claim.

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[1] The court of appeals also reversed the fee award to the extent that it was based on a purported pattern-or-practice claim, Pet. App. 17a-18a; that holding is not at issue here.

a. Although the general rule in the United States is that "litigants must pay their own attorney's fees," *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 415 (1978), Title VII permits a district court, "in its discretion," to award "a reasonable attorney's fee" to "the prevailing party, other than the Commission or the United States." 42 U.S.C. 2000e-5(k). The EEOC and the United States may be liable for costs under this provision. *Ibid.*

As this Court has explained, a prevailing defendant, as well as a prevailing plaintiff, may obtain attorney's fees under Title VII. *Christiansburg*, 434 U.S. at 419-420. But, the Court clarified, such fees should not be awarded as a matter of course to a prevailing defendant. *Id.* at 421-422. Rather, a district court may award attorney's fees to a prevailing defendant only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421.

As the court of appeals explained, "[p]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." Pet. App. 18a (quoting *Marquart* v. *Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994)). The determination that the plaintiff's legal position was "frivolous, unreasonable, or groundless" (*Christiansburg*, 434 U.S. at 422) depends on an assessment of the merits of the plaintiff's claims for relief. As the court of appeals correctly recognized, the district court did not address the merits of the EEOC's claims of sex discrimination with respect to the claimants for whom the EEOC failed to sufficiently investigate and conciliate. Petitioner did not obtain

summary judgment based on a finding that the EEOC failed to establish one of the elements of its claims. Rather, the district court dismissed those claims without regard to their merits on the ground that the EEOC failed to fulfill the statutory preconditions to bringing suit. See Pet. App. 213a.

Petitioner contends (Pet. 12) that the district court's dismissal was a ruling on the merits because the failure to sufficiently investigate and conciliate is "a failure to satisfy an element" of the EEOC's claim. That is wrong. The EEOC's obligation to investigate and conciliate are "nonjurisdictional precondition[s] to filing suit," not "element[s] of the claim." Pet. App. 22a; see *Mach Mining*, 135 S. Ct. at 1651 (conciliation is a "prerequisite[] to suit"). These preconditions are administrative steps that the EEOC must take before it can file suit under Title VII. See 42 U.S.C. 2000e-5(b) and (f). They do not define the scope of the cause of action: they "do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII." Pet. App. 23a.

b. This Court's recent decision in *Mach Mining* confirms that a district court may not award attorney's fees for failure to follow these pre-suit requirements. The Court explained that the EEOC's duty to conciliate is a "prerequisite[] to suit in Title VII litigation," just like the requirements that a private plaintiff file a timely charge with the EEOC and that an employee obtain a right-to-sue letter before going to court. 135 S. Ct. at 1651-1652. The effect of the EEOC's fulfilling its conciliation obligation is that its "claim against the employer [may] go forward" in court, not that the EEOC has established an element of the claim. *Id.* at 1651.

Mach Mining's discussion of the remedy for failure to fulfill this pre-suit condition confirms that attempted conciliation is not an element of a Title VII claim. As the Court explained, if a district court "find[s] in favor of the employer" on a failure-to-conciliate defense, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance"—not to dismiss the case. 135 S. Ct. at 1656. If petitioner were correct that attempted conciliation is an element of the Title VII claim, dismissal rather than an order of compliance would have been the expected remedy.[2]

Petitioner contends (Pet. 22-24) that attorney's fees must be available for failure to satisfy pre-suit requirements to ensure that conciliation occurs. The premise underlying this argument is that courts may thoroughly review the EEOC's compliance with pre-suit requirements such as conciliation and dismiss a case when they decide the EEOC has not tried hard enough to settle a case. But this Court rejected that premise in *Mach Mining*, explaining that courts should conduct a "relatively barebones review" to "allow[] the EEOC to exercise all the expansive dis-

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[2] Petitioner contends (Pet. 12-14) that dismissal remains an appropriate remedy, despite the clear language in *Mach Mining*, because the EEOC failed to sufficiently investigate as well as failing to sufficiently conciliate. But the Court recognized that the appropriate remedy for the EEOC's failure to fulfill a pre-suit condition is to give the EEOC the opportunity to fulfill that condition, not to dismiss the case outright. 135 S. Ct. at 1656. That holding makes sense, because an employer that violates Title VII should not escape liability based on the EEOC's failure to fulfill pre-suit conditions. And in any event, *Mach Mining* recognizes that the EEOC's duty to investigate and conciliate are preconditions to suit, not elements of a Title VII violation. *Id.* at 1651-1652.

cretion Title VII gives it to decide how to conduct conciliation efforts and when to end them." 135 S. Ct. at 1656. *Mach Mining* also clarified that a district court should not dismiss a case based on failure to conciliate. *Ibid.* Petitioner's policy arguments fail to account for *Mach Mining*.

c. Petitioner contends (Pet. 18-20) that the EEOC's failure to sufficiently investigate and conciliate should be treated the same as the employer-numerosity requirement in Title VII's definition of employer. In *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), this Court held that the requirement that a company have 15 or more employees to be considered an "employer" under Title VII (see 42 U.S.C. 2000e(b)) should be considered "an element of a plaintiff's claim for relief, not a jurisdictional issue." 546 U.S. at 516. But as the court of appeals correctly explained, the EEOC's pre-suit obligations, unlike the employer-numerosity requirement, do not address whether the employer is subject to Title VII or whether the employer has violated the law. See Pet. App. 23a. Title VII's employee-numerosity limitation is merits-related because it determines whether an employer is subject to—and thus can violate—Title VII. Title VII's pre-suit requirements, in contrast, have nothing to do with establishing whether the statute was violated; instead, compliance with those requirements simply permits the EEOC to try to establish a violation in court. See *Mach Mining*, 135 S. Ct. at 1651.

Petitioner likewise errs (Pet. 20-22) in relying on this Court's decision in *Christiansburg*. In that case, the Court determined whether and in what circumstances a prevailing defendant—as opposed to a pre-

vailing plaintiff—can obtain attorney's fees under Title VII. The Court concluded that a prevailing defendant may obtain attorney's fees, but that such an award should be rare, appropriate only when a plaintiff's claim is frivolous, unreasonable, or groundless. 434 U.S. at 418-422.

Petitioner contends (Pet. 20-21) that *Christiansburg* supports its position here because the basis for attorney's fees in that case was not a merits determination, but a finding that no charge was pending with the EEOC when the EEOC obtained the right to sue in its own name in 1972. But this Court did not uphold an award of attorney's fees on that basis; rather, the courts below *declined* to award attorney's fees, and this Court affirmed that determination. And the Court did not opine on whether the asserted basis for fees was an appropriate one. *Christiansburg* therefore does not establish that attorney's fees are appropriate based on non-merits determinations.

2. Contrary to petitioner's contention (Pet. 14-17), there is no disagreement in the circuits on the question presented. The cases upon which petitioner relies are distinguishable or have been overruled or undermined by this Court's recent decision in *Mach Mining*. In any event, the Court's recent decision in *Mach Mining* makes certiorari particularly inappropriate at this time.

The first decision upon which petitioner relies, *EEOC* v. *Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014), did not address the question presented here. In *Propak Logistics*, the district court granted summary judgment to the employer on grounds of laches (an unreasonable delay in asserting one's rights that materially prejudiced the defendant). *Id.* at 148-150.

The district court awarded the employer attorney's fees on several grounds, including that the claim for relief was moot because the employer had closed its facilities and that the claim could not be established because the alleged victims and witnesses, as well as the relevant employment records, were unavailable. *Ibid.*

The question for the court of appeals was whether the district court abused its discretion in awarding attorney's fees under Title VII on the facts of that case; the court of appeals found no abuse of discretion. 746 F.3d at 151-152, 154. The court did not consider whether a dismissal solely based on the EEOC's failure to fulfill its pre-suit obligation to investigate or conciliate could be a basis for attorney's fees. Indeed, the employer never argued that the EEOC failed to satisfy any aspect of Title VII's pre-suit requirements, and these requirements were in fact satisfied. See *id.* at 148-149 (noting that the EEOC investigated, issued a reasonable-cause determination, and attempted conciliation).

The Eleventh Circuit's decision in *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003), likewise does not conflict with the decision below. In *Asplundh*, the district court had dismissed the lawsuit and awarded attorney's fees based on the EEOC's failure to engage in sufficient conciliation before filing suit. *Id.* at 1259. The court of appeals agreed that the EEOC should have tried harder to settle the suit and upheld the attorney's fees award. *Id.* at 1259-1261. But the court's focus was on whether the EEOC had failed to fulfill its conciliation duty prior to filing suit, not whether such a failure was an appropriate basis for attorney's fees. See *ibid.* And

the court of appeals' decision that the EEOC had failed to fulfill its conciliation duty does not survive *Mach Mining*. In *Mach Mining*, the Court noted that some courts had gone "too far" in their review of conciliation, and it cited *Asplundh* as one example. See 135 S. Ct. at 1651 & n.1, 1654-1655. The Court described *Asplundh* as a case in which the lower courts had failed to "enforce the law Congress wrote" and improperly "impose[d] extra procedural requirements." *Id.* at 1654-1655. Accordingly, *Asplundh* is no longer good law.

Petitioner also cites (Pet. 16 n.7) *EEOC* v. *Agro Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009). In that case, which concerns the Americans with Disabilities Act, the district court granted summary judgment to the employer on the ground that the complainant was not disabled and that the employer had offered a reasonable accommodation, and the court of appeals upheld that ruling. *Id.* at 469-472. In passing, the court of appeals remarked that a court could "dismiss[] the case and award[] attorneys' fees" if the EEOC had failed to sufficiently conciliate. *Id.* at 469. As petitioner recognizes (Pet. 16 n.7), that statement was dicta, because the basis for attorney's fees was the failure of the ADA claim on its merits. 555 F.3d at 472-473.

Finally, the decision in *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982), does not establish a circuit split warranting this Court's review. That case concerned whether the EEOC had to make its own reasonable-cause finding or conciliate when an employee filed sex-discrimination charges with both the Department of Labor (DOL) and the EEOC and the DOL investigated and found cause to support the

charge. *Id.* at 606-608. The court of appeals concluded that, in those circumstances, the EEOC was still required to investigate and conciliate itself, and so it declined to enforce a settlement agreement between the EEOC and the employer. *Id.* at 607-609. The court also affirmed the district court's award of attorney's fees under abuse-of-discretion review. *Id.* at 609. But the court did not consider the legal issue whether the EEOC's failure to follow pre-suit requirements can be the basis for an attorney's fees award. Instead, the court simply concluded that there was "adequate support in the record to uphold" the district court's award under abuse-of-discretion review. *Ibid.*

More broadly, this Court's recent decision in *Mach Mining* undermines the analysis in the decisions petitioner cites in two critical respects. First, to the extent that those cases suggest that a district court may dismiss a case (rather than stay the action) based on the EEOC's failure to conciliate, see, *e.g.*, *Pierce Packing*, 669 F.2d at 607, they are inconsistent with *Mach Mining*'s teaching that dismissal is not an appropriate remedy. See 135 S. Ct. at 1656. Second, to the extent that those cases hold that the EEOC failed to sufficiently conciliate, they apply a much more stringent standard than the Court set out in *Mach Mining*. In *Pierce Packing*, for example, an EEOC investigator conducted an on-site compliance review and sent Pierce Packing a detailed letter describing the discriminatory conduct the EEOC found and proposing supplemental settlement terms to resolve the discrimination. 669 F.2d at 606-607. The court of appeals decided that "[t]he exchange of letters between Pierce and the EEOC was inadequate to consti-

tute *legitimate* conciliation" and that the EEOC could not initiate litigation until "the possibility of voluntary compliance has been *exhausted*." *Id.* at 608 (citation omitted; emphases added). *Mach Mining*, by contrast, makes clear that the EEOC has "leeway" on "how to seek voluntary compliance and when to quit the effort" and "discretion over the pace and duration of conciliation" and that a court goes "too far" when it second-guesses those strategic decisions. 135 S. Ct. at 1654-1655.

There is, accordingly, ample reason to believe that in the wake of *Mach Mining* the Ninth Circuit would reach a different result in *Pierce Packing* and the Eleventh Circuit would reach a different result in *Asplundh*—indeed, there is no reason to think that petitioner here could obtain dismissal and an award of attorney's fees in any circuit after *Mach Mining*. At the very least, because the courts of appeals have not yet had the opportunity to consider the effect of *Mach Mining* on requests for attorney's fees based on the EEOC's failure to follow pre-suit requirements, review of the question presented would be premature at this time.[3]

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[3] Petitioner also cites (Pet. 16-17) a variety of decisions regarding private Title VII suits and suits brought under 42 U.S.C. 1983. One of those decisions is an unpublished summary order, and none of the decisions addresses the question here, which is whether the EEOC's failure to follow pre-suit investigation and conciliation requirements may serve as a basis for attorney's fees. Indeed, attorney's fees for Section 1983 lawsuits are governed by a different statute, 42 U.S.C. 1988. Of the two cited cases that involved Title VII's attorney's fees provision, both *reversed* a district court's award of attorney's fees, and neither involved a dismissal based on the EEOC's failure to fulfill pre-suit requirements. See *Marquart*, 26 F.3d at 852 (plaintiff voluntarily dismissed case);

3. This case would be a poor candidate for further review for at least two additional reasons. First, the Court's recent decision in *Mach Mining* seriously undermines the basis for the attorney's fees award in this case. The EEOC's position was that it was required to investigate and conciliate with respect to its claim for relief, and was required to give petitioner notice of the class for which it seeks relief, but it did not need to conciliate with respect to every member of the class. See Pet. App. 158a-159a (Murphy, J., concurring in part and dissenting in part). The court of appeals rejected that standard and imposed a demanding standard for pre-suit investigation and conciliation, see *id.* at 105a-114a, and it affirmed the district court's dismissal of the EEOC's claims as an appropriate remedy.

But *Mach Mining* makes clear that the Eighth Circuit and other courts had gone too far in their review of the EEOC's pre-suit efforts. The Court clarified that the EEOC has "wide latitude over the conciliation process," including "extensive discretion" to determine when and how to conciliate. 135 S. Ct. at 1649, 1652. All the EEOC must do, this Court said, is "communicate in some way" with the employer in an effort to achieve the employer's voluntary compliance; "inform the employer about the specific allegation," typically in a letter that "describes both what the employer has done and which employees (*or what class of employees*) have suffered as a result"; and "try to engage the employer in some form of discussion" to "give the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1655-

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Anthony v. *Marion Cnty. Gen. Hosp.*, 617 F.2d 1164, 1169-1170 (5th Cir. 1980) (case dismissed based on failure to prosecute).

1656 (emphasis added). A court may review "those requirements"—"and nothing else." *Id.* at 1656. The court of appeals' review of the EEOC's investigation and conciliation in this case was much more searching than the Court envisioned in *Mach Mining*. Moreover, even if the EEOC had failed to conciliate, the court of appeals' affirmance of the dismissal of the EEOC's lawsuit on the merits is at odds with this Court's conclusion that dismissal is not appropriate for a failure to conciliate. *Ibid.* Because petitioner should never have been eligible for attorney's fees in the first place, this case would be an exceptionally poor vehicle for considering the question presented.

Second, even if the EEOC failed to conciliate and even if dismissal were an appropriate remedy for that failure, the EEOC's failure to investigate and conciliate with respect to each class member cannot be the basis for attorney's fees because the district court's decision in this case was the first to impose that requirement. See Pet. App. 158a-160a (Murphy, J., concurring in part and dissenting in part). The EEOC's failure to have anticipated that novel interpretation of Title VII does not make its claim "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421-424. And that is particularly so given that Judge Murphy's dissent embraced the EEOC's position in this very case. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent Equal Employment Opportunity Commission ("EEOC") required Petitioner CRST Van Expedited, Inc. ("CRST") to litigate more than 150 separate, individual claims of sexual harassment based on the EEOC's misrepresentation to the district court that the EEOC had valid factual and legal grounds for each claim. Even though the courts below held that the EEOC had wholly "abdicated" its statutory obligations to investigate, find reasonable cause, and attempt to conciliate each individual claim before filing its lawsuit, the EEOC escaped financial responsibility for its statutory violation by arguing that CRST did not prevail "on the merits."

Just as the EEOC over-reached in *Mach Mining*[1] by arguing that the question whether it had satisfied its statutory pre-suit conciliation requirement is beyond judicial review, the EEOC contends in this case that it can violate *all* of Title VII's pre-suit requirements (investigation, reasonable cause determination, and conciliation) with impunity and impose millions of dollars in unnecessary litigation fees and expenses on defendant employers.

The decisive reason why petitioner should be awarded fees based on the EEOC's decision not to comply with those pre-suit requirements is that such an award fulfills Congress's reason for enacting the pre-suit requirements. When in 1972 Congress authorized the EEOC to litigate in its own right and not through the Department of Justice, Congress sought to protect

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[1] *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

courts and employers from the cost and disruption of the EEOC's assertion of unfounded claims by requiring that the EEOC not file suit until after it has investigated, found reasonable cause, and attempted to avoid litigation through conciliation. *See EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974); *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977). Consequently, if the EEOC files suit without having first investigated, found reasonable cause, and attempted to conciliate, the defendant employer should be protected from loss through Title VII's attorneys' fee provision. Just as the Eighth Circuit did below, the EEOC's brief ignores this fundamental consideration.

I. The EEOC Wholly Failed to Satisfy Title VII's Pre-Suit Requirements.

The EEOC's effort to justify its conduct in this case is refuted by the record and the decisions below. Both lower courts found that this case involves the EEOC's flagrant violation of all three of its Title VII pre-suit obligations. The district court found that the EEOC had "wholly abandoned" its statutory obligations to investigate, find reasonable cause, and attempt to conciliate before filing suit. Pet. App. 204a. The Eighth Circuit similarly found that "[t]he present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women. . . ." Pet. App. 115a-116a. Indeed, the EEOC admitted below that it had not investigated, found reasonable cause, or sought to conciliate any of the 67

claims dismissed for its failure to do so because it did not even know of the claims when it filed suit.[2]

Thus, the courts below did not, as the EEOC argues, engage in a more extensive review of the EEOC's administrative process than *Mach Mining* permits and find that the EEOC's conciliation efforts were merely "insufficient." EEOC Br. at 8, 19-20. There was *no* investigation, determination of reasonable cause, or conciliation of these 67 claims.

The fact that the EEOC investigated the original charging party's claim provided no basis for asserting claims that other individuals suffered sexual harassment on CRST's trucks. Although the EEOC sought to establish that CRST had engaged in a pattern or practice of tolerating such sexual harassment, the district court found that the EEOC had not presented even a *prima facie* pattern-or-practice case. The EEOC then elected not to appeal the district court's summary-judgment ruling rejecting EEOC's pattern-or-practice allegations. Thus, there was no "class" here, as the EEOC has argued, but instead merely a large group of unrelated individual claims.

The EEOC also has no basis for arguing that this Court's decision in *Mach Mining* raises questions about the propriety of the dismissal of the 67 claims involved here. *Mach Mining* decided only whether the EEOC's conciliation efforts are subject to judicial review and, if so, what the EEOC must do to comply with the

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[2] EEOC Resistance to CRST's Motion for an Order To Show Cause at 7-8 in *EEOC v. CRST Van Expedited, Inc.*, 1:07-cv-0095-LRR (N.D. Iowa May 15, 2009), ECF No. 229.

conciliation requirement. In this case, the EEOC not only failed to conciliate these 67 claims, but admittedly did not investigate or find reasonable cause for them before it filed suit. *Mach Mining* confirms that the EEOC must, through its investigation and determination of reasonable cause, identify the claims it intends to litigate because otherwise conciliation would be futile:

> EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.... If the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation.

135 S. Ct. at 1652.

Here, unlike the EEOC's class sexual discrimination claim in *Mach Mining*, these highly individualized claims would have had to be investigated, determined to be supported by reasonable cause, and conciliated on a claim-by-claim basis. These claims involve different alleged harassers, different times and locations of the alleged harassment, and different kinds and degrees of alleged harassment.

The EEOC also argues that, under *Mach Mining*, dismissal was inappropriate here and that it should have been allowed, after discovery had been completed and just weeks before the trial date, for the very first time to investigate, find reasonable cause, and

conciliate these 67 claims. EEOC Br. at 12 & n.2. The EEOC fails to note that, when it began to assert a host of individual claims, ultimately totaling 270 claims, CRST moved for relief on the ground that such a sudden proliferation of claims strongly suggested that the EEOC did not have factual or legal support for the claims. The district court denied CRST's motion based on the EEOC's unequivocal representation that it had reasonable grounds for each of the claims.[3]

During the following months, CRST took the depositions of 154 individual EEOC claimants[4] and engaged in expert discovery on the EEOC's pattern-or-practice allegations. CRST moved to dismiss these 67 claims on statutory pre-suit requirement grounds only after the district court rejected the EEOC's pattern-or-practice allegations and held that there was no "class" claim here but instead unrelated individual claims. By that point, CRST had incurred millions of dollars in attorneys' fees and expenses in litigating these 67 claims because the EEOC had not investigated, found reasonable cause, or conciliated any of these 67 claims even though the EEOC had misrepresented to the district court that it had valid grounds for each claim. Therefore, the injury sustained by CRST because of the EEOC's tactics could not possibly be cured by 67 *nunc pro tunc* administrative investigations,

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[3]The district court also cautioned EEOC that if its representation proved false, CRST could seek a remedy. Pet. App. 39a.

[4]116 of EEOC's original 270 individual claims were dismissed, including 99 because the claimants did not appear for their depositions. Pet. App. 39a-40a.

reasonable-cause determinations, and conciliation attempts.

II. The Eighth Circuit Ruling Conflicts With Three Other Circuits' Holdings.

The EEOC is plainly wrong in contending that "there is no disagreement in the circuits on the question presented." EEOC Br. at 9. The Fourth, Ninth, or Eleventh Circuits have held that a dismissal of a case based on the EEOC's failure to satisfy Title VII's pre-suit requirements entitles the prevailing defendant to an attorneys' fee award if the *Christiansburg* unreasonableness standard is met.[5] *See EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152-54 (4th Cir. 2014); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982). The EEOC fails to distinguish these cases.

In *Propak*, the Fourth Circuit affirmed the district court's fee award to the defendant employer because the EEOC "acted unreasonably in initiating the litigation" without having identified potential individual claimants during its investigation. 746 F.3d at 152-54. The EEOC tries to distinguish *Propak* by noting that summary judgment was granted by the district court on the ground of laches, not failure to satisfy Title VII's pre-suit requirements. However, the EEOC ignores the fact that the laches holding in *Propak* was based on the fact that when it filed suit the EEOC was unable to identify any claimants, just as it filed suit here without

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[5] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

being able to identify the 67 claims involved in this case. *See EEOC v. Propak Logistics, Inc.*, Civ. A. No. 09 cv 311, 2013 WL 1232959, at *4 (W.D.N.C. March 27, 2013) (record citations omitted), *aff'd*, 746 F.3d 145 (4th Cir. 2014), *Propak Logistics, Inc.*, 746 F.3d at 148-49.

Moreover, the Fourth Circuit specifically held that the district court's award of attorneys' fees was not based on its laches ruling, but instead on the EEOC's filing a lawsuit when it could not identify any claimants and had no basis for obtaining relief. 746 F.3d at 152. That is very similar to what happened here.

The EEOC also ignores the fact that in *Propak* it did not contest that the defendant had "prevailed" for purposes of obtaining an attorneys' fee award. *Id.* at 151 n.8. The EEOC has not even tried to rationalize why the defendant in *Propak* admittedly qualified for a Title VII fee award, but CRST does not. No valid distinction is possible.

The EEOC's effort to distinguish *Pierce Packing* bears little resemblance to what was actually decided in that case. The EEOC erroneously contends that the main issue in *Pierce* was whether the EEOC was required to conduct its own investigation or could instead rely on an investigation by the Department of Labor ("DOL"). EEOC Br. at 16-18. In fact, both the district court and Ninth Circuit held that Title VII required the EEOC to undertake its own investigation, make a reasonable cause determination, and attempt conciliation before filing suit. 669 F.2d at 607-08. When a preliminary settlement agreement failed, the EEOC filed suit without complying with those statutory pre-suit requirements. *Id.* at 608. The Ninth Circuit never

even suggested that the DOL investigation would satisfy the EEOC's obligations under Title VII.

The EEOC also erroneously argues that the Ninth Circuit affirmed the district court's award of attorneys' fees against the EEOC based solely on the absence of an abuse of discretion. EEOC Br. at 17. To the contrary, the Ninth Circuit specifically held that the record supported the fee award based on the EEOC's violation of its statutory pre-suit obligations:

> The district court found that: "These procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history. The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness." There is adequate support in the record to uphold this finding.
>
> . . . The only abuse of discretion which has been shown has been the premature filing of this case by the EEOC.

Pierce Packing, 669 F.2d at 609.

The EEOC's attempt to distinguish the Eleventh Circuit's decision in *Asplundh* is also flawed. The EEOC does not deny that the Eleventh Circuit held that a fee award to the defendant is appropriate if the EEOC brought suit without satisfying Title VII's pre-suit obligations. Instead, the EEOC argues that, under *Mach Mining*, the Eleventh Circuit erred in finding a violation of the pre-suit obligations. EEOC Br. at 15-16. But the statutory violation and the fee award are two separate holdings, and the fee award is a valid

precedent in the Eleventh Circuit for any subsequent case in which the EEOC is found to have violated Title VII's pre-suit requirements and the case has been dismissed.

Given that the Eighth Circuit categorically held in this case that fees cannot be awarded to CRST even though the EEOC unquestionably failed to investigate, find reasonable cause, and conciliate before filing suit, there is a clear and direct circuit conflict.

III. *Arbaugh* Also Cannot Be Distinguished.

Just as the EEOC cannot distinguish *Propak*, *Pierce*, and *Asplundh*, it also cannot logically explain how Title VII's numerosity requirement is a "merits" issue, as this Court held in *Arbaugh*, but Title VII's pre-suit requirements are not. Indeed, Title VII's pre-suit requirements are more of a merits issue than numerosity because the EEOC's compliance with then defines the nature and scope of the claims it is permitted to litigate. The Eighth Circuit explained this point in the prior appeal in this case:

> The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or *developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

Pet. App. 109a (emphasis in original), *quoting EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992).

The EEOC's brief does nothing more than repeat the Eighth Circuit's question-begging distinction of this case from *Arbaugh*, and thus fails to show any actual difference:

> Title VII's employee-numerosity limitation is merits-related because it determines whether an employer is subject to—and thus can violate—Title VII. Title VII's pre-suit requirements, in contrast, have nothing to do with establishing whether the statute was violated; instead, compliance with those requirements simply permits the EEOC to try to establish a violation in court.

EEOC Br. at 13; *see* the Eighth Circuit's similar statement at Pet. App. 23a.

Plainly, the numerosity requirement has no bearing on whether Title VII has been violated. There are many employers with 15 or more employees that are not violating Title VII. The numerosity requirement determines only whether Title VII applies to the employer in question, not whether it has been violated.

On the other hand, if the EEOC investigates a charge, determines that the charge is supported by reasonable cause, and unsuccessfully attempts conciliation, the EEOC is authorized to assert a claim in court that the employer has violated Title VII based on the evidence that supports its reasonable cause determination. If instead, the EEOC determines that the charge is not supported by reasonable cause, for that very reason the EEOC cannot claim that the employer violated Title VII. Consequently, the pre-suit

requirements are much closer to the core merits of a Title VII claim than the numerosity requirement.

IV. There Is No Reason To Delay Resolution of the Circuit Conflict.

The EEOC illogically argues that it would be premature for the Court to decide this attorneys' fee issue because *Mach Mining* recently clarified the extent of judicial review of the EEOC's satisfaction of its Title VII conciliation obligation. EEOC Br. at 18. *Mach Mining* is relevant only to whether EEOC filed suit without satisfying Title VII's pre-suit requirements, not whether attorneys' fees can be awarded when, as here, the EEOC's violation of those requirements has been established. As discussed above, the lower courts' decisions finding that the EEOC failed to satisfy the statutory pre-suit requirements are fully consistent with *Mach Mining*. Moreover, this case goes well beyond the EEOC's failure to conciliate, which was the only issue in *Mach Mining*. The EEOC litigated these 67 claims even though it admittedly did not investigate, find reasonable cause, or attempt to conciliate a single one of these claims. Indeed, when the EEOC filed this suit, it was not even aware that these claims existed.

Delaying resolution of the circuit conflict will serve only to deny CRST the attorneys' fee award that Congress intended to provide under these extraordinary circumstances—and result in such awards being granted or denied depending solely on the circuit in which the EEOC filed suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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June 2015

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IN THE

Supreme Court of the United States

No. 14-1375

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and 37.2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) and National Federation of Independent Business Small Business Legal Center (NFIB) hereby respectfully move this Court for leave to file the

accompanying brief as *amici curiae* in support of the position of the Petitioner in this case. The written consent of the attorney for the Petitioner has been filed with the Clerk of the Court. The consent of the attorney for the Respondent was requested but not acted upon.

In support of its motion, EEAC and NFIB submit the following:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own,

operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

3. Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this case regarding whether attorney's fees are available to a prevailing defendant when a Title VII claim is dismissed based on the U.S. Equal Employment Opportunity Commission's (EEOC) failure to meet its statutory investigation requirements prior to initiating litigation.

4. As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the

relevant concerns of the business community and the significance of this case to employers generally.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully request the Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* in support of the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this matter regarding the propriety of awarding attorney's fees to a prevailing defendant where the EEOC's failure to investigate or attempt conciliation results in dismissal of a subsequent Title VII lawsuit. The court below ruled, erroneously, that an award of attorney's fees and costs is unavailable in the absence of a judicial determination on the merits of the underlying claim, and that dismissal for failure to investigate or conciliate does not constitute a merits decision.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

On September 27, 2007, the EEOC commenced a civil action against CRST Van Expedited, Inc. (CRST), accusing the company of engaging in unlawful sex discrimination against a class of unidentified female drivers, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Pet. App. 34a. During discovery, the EEOC ultimately identified 270 women who allegedly had experienced sexual harassment. Pet. App. 38a.

At the close of discovery, the district court dismissed 99 of the individual claims as a discovery sanction. Pet. App. 40a. The EEOC did not appeal that determination. *Id.* Subsequently, the district court granted summary judgment to CRST on more than half of the remaining claims on a variety of bases. Finally, the district court granted CRST's motion to dismiss the last 67 individual claims because the agency had failed to comply with its statutory obligation under Title VII to investigate, issue a reasonable cause determination, and conciliate the claims. Pet. App. 204a, 213a.

Thereafter, CRST moved for an award of attorney's fees on the ground that the EEOC's actions in bringing the case were unreasonable and vexatious. *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564, at *7, *vacated by* 760 F.3d 847 (8th Cir. 2012). Applying the standard for awarding attorney's fees to prevailing defendants in Title VII cases established by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the district court determined that an award of fees was warranted because "[t]he EEOC's failure to investigate and attempt to conciliate the individual claims constituted

an unreasonable failure to satisfy Title VII's prerequisites to suit." *Id.* Accordingly, the lower court ordered the EEOC to reimburse approximately $4.5 million of the attorney's fees and other costs incurred by CRST. *Id.* at *20.

On appeal, the Eighth Circuit affirmed the dismissal of the 67 individual claims, determining that the "record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women...." Pet. App. 115a-116a. The court also affirmed on the vast majority of claims on which summary judgment had been granted. Pet. App. 116a-156a. Because two claims were remanded to the district court, the Eighth Circuit vacated the award of attorney's fees and costs to CRST without prejudice. Pet. App. 156a.

After entry of final judgment on remand, the district court awarded CRST a total of $4,189,296.10 in attorney's fees, $413,387.58 in out-of-pocket expenses, and $91,758.46 in taxable costs. Pet. App. 84a-85a. The EEOC appealed, arguing that it was the prevailing party because it only brought one claim, which it settled out-of-court with CRST. Pet. App. 17a.

On appeal, the Eighth Circuit rejected the EEOC's argument that it was the prevailing party, Pet. App. 17a, but found that because the EEOC never formally asserted that CRST was engaged in a pattern-or-practice of sex discrimination, the trial court erred to the extent it awarded attorney's fees on that basis. Pet. App. 18a.

The Eighth Circuit also reversed the attorney's fee award as to the 67 individual claims that were dismissed because of the EEOC's failure to satisfy its pre-suit requirements. Pet. App. 23a-24a. Finally, it

vacated the lower court's fee award with respect to the individual claims dismissed on summary judgment, and remanded the fee issue for a determination by the district court whether each individual claim was unreasonable under *Christiansburg*. Pet. App. 28a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Review of the decision below is warranted to settle a conflict in the courts on an issue that is of substantial importance to the employer community regarding the circumstances under which a prevailing defendant is entitled to attorney's fees under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Specifically, lower courts disagree as to the propriety of an attorney's fee award for the U.S. Equal Employment Opportunity Commission's (EEOC) unreasonable litigation conduct stemming from the agency's failure to satisfy its pre-suit administrative investigation requirements in advance of bringing a lawsuit. In ruling that a prevailing defendant may not be awarded fees on that basis, the Eighth Circuit departs from decisions of the Fourth and Ninth Circuits.

The EEOC was created by Congress to enforce Title VII, which prohibits discrimination in the terms, conditions, and privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII establishes "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)).

The EEOC is authorized to bring a lawsuit against an employer in federal court, but only after it has discharged its statutory pre-suit administrative requirements, including completing an investigation of the charge. 42 U.S.C. § 2000e-5(b). In addition, the permissible scope of a lawsuit brought by the EEOC is limited to seeking relief on behalf of the "individuals and wrongdoing [discovered] *during the course of its investigation.*" Pet. App. 109a (citations omitted).

Title VII contains a fee-shifting provision that allows a court to award reasonable attorney's fees and costs to the prevailing party, expressly providing that the EEOC "shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k). As this Court recognized, one of the purposes of the fee-shifting provision is to "'deter the bringing of lawsuits without foundation'...." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (citation omitted). To that end, the Court in *Christiansburg* held that a prevailing defendant may be assessed attorney's fees and costs when a court determines that a claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422.

Despite the importance of Title VII's administrative scheme, the EEOC repeatedly has circumvented the process in recent years by failing to investigate the claims of all those on whose behalf it seeks relief, and by persistently refusing to engage in meaningful efforts to resolve such claims informally, without resort to protracted litigation. The Fourth and Ninth Circuits are of the view that, under *Christiansburg*, a prevailing defendant is entitled to an award of attorney's fees for costs directly related to the EEOC's

failure to discharge its mandatory pre-suit administrative duties.

The decision below is in direct conflict. Specifically, even though the EEOC "wholly failed to satisfy its statutory pre-suit obligations" as to at least 67 individual claims, Pet. App. 115a-116a, the Eighth Circuit disagreed that the EEOC's malfeasance did not support an attorney's fee award, because the EEOC's "failure to satisfy Title VII's pre-suit obligations does not constitute a ruling on the merits." Pet. App. 23a-24a.

The EEOC has embarked recently on an aggressive litigation strategy. In its zeal to litigate large, high profile class-based suits, the agency's enforcement priorities seemingly have moved away from informal resolution of discrimination charges, as contemplated by Title VII, and towards broad, systemic litigation. The EEOC's failure to comply in every instance with its statutory duty to investigate and conciliate prior to suit is particularly problematic where, as here, a single individual charge is transformed by the EEOC into a complex, time-consuming, and expensive lawsuit brought on behalf of approximately 270 individuals. Pet. App. 38a. This recurring pattern by the EEOC of resorting to litigation prior to first satisfying its pre-suit responsibilities provides compelling support for utilizing the sanction of attorney's fees as a deterrent against inexcusable dereliction of the agency's compliance with Title VII.

REASONS FOR GRANTING THE WRIT

WHETHER AND TO WHAT EXTENT A PREVAILING DEFENDANT IS ENTITLED UNDER TITLE VII TO AN ATTORNEY'S FEE AWARD AS A RESULT OF THE EEOC'S UNREASONABLE LITIGATION CONDUCT IS A RECURRING ISSUE THAT IS OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

This case presents a matter of national importance to the more than half a million American employers, large and small, that are subject to enforcement of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, by the U.S. Equal Employment Opportunity Commission (EEOC). Although Title VII mandates that the EEOC must satisfy a number of interrelated, pre-suit administrative requirements prior to commencing suit in federal court, the lower courts are in disagreement regarding whether an employer may recoup attorney's fees and costs expended in defending an EEOC suit that was not first subject to a proper investigation and ultimately was found to have been frivolous, unreasonable, or groundless on that basis. Because of the significance of this question to all employers subject to Title VII, review by this Court is warranted.

A. The Eighth Circuit's Holding Is In Direct Conflict With Decisions By The Fourth And Ninth Circuits Permitting Prevailing Defendants To Recover Attorney's Fees For Claims Dismissed Because Of The EEOC's Failure To Satisfy Its Mandatory Title VII Pre-Suit Administrative Investigation Procedures

Title VII prohibits discrimination in the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute contains a fee-shifting provision that permits a court to award a prevailing party reasonable attorney's fees:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k).

In *Christiansburg Garment Co. v. EEOC*, this Court enunciated the standard for assessing attorney's fees and costs in favor of a prevailing defendant in a Title VII case. 434 U.S. 412 (1978). The Court held that a prevailing defendant is entitled to an award of attorney's fees and costs when a court finds that the claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The Court reasoned that a heightened burden is necessary so as not to "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.*

At the same time, the Court observed that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420. The Court also noted that Title VII's attorney's fee provision "explicitly provides that 'the Commission and the United States shall be liable for costs the same as a private person.'" *Id.* at 423 n.20 (citation omitted). Thus, the Court found "no grounds for applying a different general standard whenever the Commission is the losing plaintiff." *Id.*

In addition, a court may order attorney's fees in favor of a prevailing defendant "even if a plaintiff's suit is not wholly frivolous." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011).[2] "Fee shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees." *Id.* The fee provision thus "serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary." *Id.* (citation omitted).

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[2] In *Fox*, the Court construed the attorney's fee provision set forth in 42 U.S.C. § 1988. This Court has noted that the fee-shifting provisions in 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988 "are to be interpreted alike." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (citation omitted); *see also Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (noting that § 1988 was patterned after § 2000e-5(k)).

1. The EEOC has a duty to investigate and properly conciliate Title VII discrimination charges prior to filing suit

Title VII "sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984). That multi-step administrative procedure begins with the filing, service, and investigation of a discrimination charge, and concludes with mandatory, pre-suit conciliation. 42 U.S.C. § 2000e-5(b).

When first enacted, Title VII only permitted the EEOC to prevent and correct discrimination through discrimination charge investigations and, where appropriate, "conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). In 1972, however, Congress amended Title VII to authorize the EEOC to sue private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

At the same time, Congress retained Title VII's administrative enforcement scheme as a prerequisite to suit. 42 U.S.C. § 2000e-5(f). As this Court has observed:

> When Congress first enacted Title VII in 1964 it selected "(c)ooperation and voluntary compliance . . . as the preferred means for achieving" the goal of equality of employment opportunities. ... Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative

> functions in s 706 of the amended Act. Thus, under the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; *it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. Unlike the typical litigant ... the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties.*

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977) (emphasis added) (citation omitted).

The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission ...." 29 C.F.R. § 1601.15(a) (emphasis added). Should the EEOC find reason to believe discrimination occurred, the agency may issue a determination *only* "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a). "Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission *shall* endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion." 29 C.F.R. § 1601.24(a) (emphasis added). Only when the EEOC is "unable to obtain voluntary compliance," 29 C.F.R. § 1601.25, through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. § 1601.24(a). Accordingly, unlike private litigants, the EEOC has a special obligation to carefully evaluate

the merits of every case *before* undertaking costly and resource-intensive litigation.

2. Applying the standard enunciated by this Court in *Christiansburg*, the Fourth and Ninth Circuits permit recovery of attorney's fees when an unsuccessful EEOC lawsuit followed a failure to discharge pre-suit procedures

The EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge. *See EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992). This "reasonable investigation" rule restricts the EEOC from altogether circumventing Title VII's "integrated, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62 (citation omitted), by including in a lawsuit matters that never were the subject of an investigation, reasonable cause determination, and conciliation. *See Delight Wholesale Co.*, 973 F.2d at 668-69; *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977); *EEOC v. Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 64 (W.D.N.Y. 2014), *appeal filed*, No. 14-1782 (2d Cir. May 15, 2015); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1264 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, Ind., Inc.*, 279 F. Supp. 2d 974, 979-81 (S.D. Ind. 2003). As the Eighth Circuit itself observed:

> While "[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged," it "must discover such individuals and wrongdoing *during the course of its investigation.*"

* * *

> "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation."

Pet. App. at 109a-110a (citations omitted).

It follows that dismissal of an EEOC lawsuit based on claims that were not subject to proper investigation justifies an award of attorney's fees under this Court's decision in *Christiansburg*. Indeed, the Fourth and Ninth Circuits have held that the EEOC's failure to satisfy its pre-suit administrative requirements can support a finding that the claim was "frivolous, unreasonable, or groundless" under *Christiansburg*, thus entitling a prevailing defendant to attorney's fees.

In *EEOC v. Propak Logistics, Inc.*, for instance, the Fourth Circuit affirmed an attorney's fee award to a prevailing defendant in a class action case brought by the EEOC, finding that "the EEOC acted unreasonably in filing the employment discrimination complaint, because events that occurred during the EEOC's administrative investigation precluded the EEOC from obtaining either injunctive or monetary judicial relief." 746 F.3d 145, 147 (4th Cir. 2014). In awarding attorney's fees to Propak, the lower court found that the EEOC's lawsuit "effectively was moot at its inception," *id.* at 152, in part because the agency had not identified a class of victims eligible for monetary relief during its investigation, yet nevertheless sued on their behalf. *Id.* In affirming the fee award, the Fourth Circuit observed that "the court's fee award reflected proper consideration of the

Christiansburg standard by assessing whether the EEOC acted unreasonably in initiating the litigation." *Id.* (footnote omitted).

Concurring, Judge Wilkinson wrote separately "to address an unfortunate implication in the [EEOC's] brief: *that federal agencies, and the [EEOC] in particular*, should be treated differently from private parties with regard to attorneys' fees determinations." *Id.* at 154. Recognizing that the *Christiansburg* standard is aimed to deter unjustified litigation, Judge Wilkinson stated that "it was not unreasonable for Congress to expect the Commission, with its store of expertise and experience, to recognize a baseless suit before being told the same by a federal court." *Id.* at 155. "For this reason, '[w]hen a court imposes fees on a plaintiff who has pressed a "frivolous" claim, it chills nothing that is worth encouraging.'" *Id.* (citation omitted).

Similarly, in EEOC v. Pierce Packing Co., the Ninth Circuit affirmed the lower court's grant of summary judgment and award of attorney's fees to the prevailing defendant, in part because "not once has the EEOC conducted its own statutorily mandated investigation nor has it made a reasonable cause determination." 669 F.2d 605, 608 (9th Cir. 1982) (citation omitted). It observed, "Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit which are conspicuously absent here." *Id.* In particular, as the district court found, "[t]hese procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history. The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness. There is adequate

support in the record to uphold this finding." *Id.* at 608-09 (citations omitted).

The Eighth Circuit's decision below limits civil rights fee awards to cases involving rulings "on the merits," which it has now determined excludes claims dismissed due to the EEOC's failure to meet its pre-suit duties. Pet. App. 23a-24a. Because the decision below is contrary to the principles established by this Court in *Christiansburg* and conflicts with decisions of the Fourth and Ninth Circuits on this issue, review by this Court is warranted.

B. Precluding A Prevailing Defendant From Recovering Attorney's Fees When A Claim Is Dismissed For The EEOC's Failure To Investigate Would Undermine Effective Title VII Enforcement By Removing A Powerful Disincentive Against Increasingly Abusive Litigation Tactics By The EEOC

1. The EEOC's recent enforcement efforts demonstrate both a focus on systemic litigation and a disturbing trend towards bringing suit without first satisfying all of its pre-suit obligations

Review of the decision below is especially warranted in light of the EEOC's current enforcement strategy that places particular emphasis on class-based systemic and pattern-or-practice discrimination litigation.[3] In its Strategic Enforcement Plan (SEP) for

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[3] According to the EEOC's Strategic Enforcement Plan for Fiscal Years 2013 – 2016, of particular interest to the EEOC are "issues that will have broad impact because of the number of individuals, employers or employment practices affected."

Fiscal Years 2013-2016, for instance, the EEOC has committed to progressively increasing the percentage of systemic cases on its active litigation docket each fiscal year.[4] In furtherance of that objective, the agency has established a specific, numerical target that it expects its enforcement staff to meet, largely ignoring objections from the business community that such an approach would encourage hasty, insufficient systemic charge investigations and detract from meaningful, pre-suit settlement efforts.[5] Although the EEOC's current SEP requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets, it gives no indication that pre-suit charge resolution or meaningful investigation are agency priorities. Such policies incentivize staff to bypass investigation and pre-suit conciliation in favor of high-profile, class-based lawsuits.

To the extent that the EEOC has formalized enforcement tactics that are at odds with the purposes and objectives of Title VII, it is now more important than ever that the courts retain the discretion to

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EEOC, Strategic Enforcement Plan FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 18, 2015).

[4] EEOC, SEP FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 18, 2015).

[5] The agency has exceeded the SEP active systemic litigation targets in the last two fiscal years. *See* EEOC, Fiscal Year 2013 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2013par.cfm (last visited June 18, 2015) and EEOC, Fiscal Year 2014 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf (last visited June 18, 2015).

sanction the agency for such litigation abuses. A particularly effective deterrent is the award of attorney's fees to a prevailing defendant where it is determined that the EEOC's failure to investigate results in the filing, and eventual dismissal, of a groundless lawsuit.

Moreover, as noted above, although the EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge, the agency must actually investigate prior to suit in order to invoke that rule. *See Delight Wholesale Co.*, 973 F.2d at 668-69. Despite Title VII's mandate that the EEOC must investigate and conciliate prior to resorting to litigation, the agency in recent years has embarked on a disturbing pattern of "naming everyone and asking questions later." Pet. App. 190a. *See also Propak Logistics, Inc.*, 746 F.3d at 152 (dismissing lawsuit because EEOC had not identified a specific class of victims during its investigation); *Sterling Jewelers*, 3 F. Supp. 3d at 69 (dismissing EEOC's nationwide pattern-or-practice employment discrimination claim for failure to meet pre-suit investigation requirements); *EEOC v. Bloomberg L.P.*, 967 F. Supp.2d 802, 812-16 (S.D.N.Y. 2013) (recognizing "where, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief . . . and dismiss the EEOC's Complaint[,]" and granting summary judgment on EEOC's claims for individual relief because pre-suit investigation was class-wide only); *Jillian's*, 279 F. Supp.2d at 980 (granting summary judgment in favor of employer on nationwide class allegations because "[t]he EEOC's investigation of the four charges was conducted entirely with

respect to Jillian's Indianapolis. Its Amended Complaint, alleging a nationwide class, has insufficient basis in its actual investigation").

The EEOC's rush to litigate claims that it never examined at the charge investigation stage, or failed to attempt to resolve through conciliation, confirms *amici's* growing concern that the agency effectively has abandoned its commitment to pursue meaningful administrative charge resolution, choosing instead the more expedient, high-profile litigation route. Indeed, *amici* are extremely troubled by the EEOC's recent efforts to expand its own authority under Title VII, while at the same time working to sharply curtail the role of the courts in policing its enforcement activities. *See, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015) (where the EEOC argued, unsuccessfully, that its pre-suit conciliation efforts are not subject to judicial review); *Propak Logistics, Inc.*, 746 F.3d at 150 (where the EEOC argued, again unsuccessfully, that the doctrine of laches can never be applied when the government is the plaintiff).

2. Facilitating the award of attorney's fees to prevailing defendants based on frivolous, unreasonable, or groundless EEOC lawsuits stemming from a failure to investigate would discourage the agency from pursuing ill-conceived litigation

Allowing the decision below to stand would invite the EEOC to ignore its statutorily-mandated pre-suit requirements without any meaningful consequence. As this Court observed in *Mach Mining*, "[w]e need only know – and know that Congress knows – that *legal lapses and violations occur, and especially so*

when they have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53 (emphasis added).

The EEOC statutorily is required to satisfy all of its administrative pre-suit requirements prior to filing a lawsuit. Indeed, as the Eighth Circuit itself acknowledged, "[t]he EEOC's ability to bring suit and the administrative process are '*sequential steps in a unified scheme* for securing compliance with Title VII.'" Pet. App. 19a (citation omitted). This case highlights the importance of putting into place meaningful sanctions to prevent these types of abuses, and thereby encourage compliance with the "integrated, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62, mandated by Congress.

Awarding attorney's fees to prevailing defendants in such cases also provides a check on the extra-congressional efforts by the EEOC to expand its own enforcement authority. *See Propak Logistics, Inc.*, 746 F.3d at 156 (Wilkinson, J., concurring) (recognizing that "[t]here is a danger that those inside a public bureaucracy, armed with significant resources, authority, and discretion, may become gradually numb as to how their actions affect those outside parties they investigate or sue"); *see also City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878-79 (2013) (Roberts, C.J., dissenting) (expressing concern regarding "the danger posed by the growing power of the administrative state ...," and describing "[t]he collection of agencies housed outside the traditional executive departments ... as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence") (citation omitted).

Title VII actions often are complex, time-consuming, and very costly to defend. This is especially true of the substantial number of Title VII cases brought against small to mid-sized employers whose litigation resources often pale in comparison to those of the federal government. *See Christiansburg*, 434 U.S. at 423 n.20 (noting that "many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights"). The rule created by the court below, if allowed to stand, essentially would provide the EEOC with a "get out of jail free card" — leaving a prevailing defendant on the hook for substantial attorney's fees and costs for claims that never should have been brought in the first place. *See, e.g.*, Pet. App. 84a (awarding CRST $4,189,296.10 in attorneys' fees, $91,758.46 in costs, and $413,387.58 in out-of-pocket expenses); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587, 591-92 (6th Cir. 2013) (affirming lower court's order that EEOC reimburse employer nearly $800,000 in attorney's fees and costs in having to defend against Title VII lawsuit that EEOC continued to pursue even after it should have known it had no merit); *EEOC. v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. 2012) (upholding award of over $140,000 in attorney's fees and costs because the EEOC knew or had reason to know that its lawsuit was "frivolous, unreasonable, and without foundation").

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2015

RECORD AND BRIEFS

No. 14-1375

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX
VOLUME 1 OF 2 (1a-520a)

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PETITION FOR CERTIORARI FILED MAY 19, 2015
CERTIORARI GRANTED DECEMBER 4, 2015

January 19, 2016

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RELEVANT DOCKET ENTRIES FROM THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, NO. 13-3159

***

Date Filed	Docket Text
01/16/2014	ADDENDUM of APPELLANT FILED by Appellant EEOC, w/service 01/16/2014 [4114806] [13-3159] (SRD)
01/16/2014	**BRIEF FILED** - APPELLANT BRIEF filed by EEOC. w/service 01/16/2014, Length: 20,792 words, as allowed by court order of 01/10/14 **10 COPIES OF PAPER BRIEFS FROM Equal Employment Opportunity Commission due 01/21/2014 WITH revised certificate of service for paper briefs.** Brief of CRST Van Expedited, Inc. due on 02/18/2014 [4114811] [13-3159] [THIS BRIEF HAS BEEN REPLACED BY A CORRECTED BRIEF FILED ON 1/17/2014.] (SRD)

***

01/17/2014	**BRIEF FILED** - CORRECTED Appellant/Petitioner Brief - correcting

doc # [4114811-2]. w/service 01/16/2014, Length: 20,792 words. **10 COPIES OF PAPER BRIEFS FROM Equal Employment Opportunity Commission due 01/22/2014 WITH revised certificate of service for paper briefs** [4115076] [13-3159] (MDS)

***

01/28/2014 RECORD FILED - APLNT/PET APPENDIX, 17 volumes, 6 boxes [4119211] [13-3159] (MDS)

***

04/02/2014 **BRIEF FILED** - APPELLEE BRIEF filed by CRST Van Expedited, Inc., w/ service 04/01/2014, Length: 20,951 words. **10 COPIES OF PAPER BRIEFS FROM CRST Van Expedited, Inc. due 04/07/2014 WITH revised certificate of service for paper briefs.** Reply brief of Equal Employment Opportunity Commission due on 04/16/2014.

***

04/03/2014 RECORD FILED - APLEE/RES APPENDIX, 1 volumes. Received with red covers. White covers due by 04/17/2014. [4140372] [13-3159] (MDS)

Appendix A

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05/06/2014 **BRIEF FILED** - APPELLANT REPLY BRIEF filed by EEOC. w/ service 05/02/2014, Length: 8485 words. **10 COPIES OF PAPER BRIEFS FROM Equal Employment Opportunity Commission due 05/12/2014 WITH revised certificate of service for paper briefs** [4151149] [13-3159] (MDS)

***

05/27/2014 **BRIEF FILED** - CORRECTED Appellee/Respondent Brief - correcting doc # [4140087-2]. w/service 05/23/2014, Length: 20,951 words. **10 COPIES OF PAPER BRIEFS FROM CRST Van Expedited, Inc. due 06/02/2014 WITH revised certificate of service for paper briefs** [4157717] [13-3159] (MDS)

***

08/26/2014 28(j) citation filed by Appellee CRST Van Expedited, Inc. w/service 08/26/2014 - FOR CAL [4189649] [13-3159] (JTM)

09/11/2014 **ARGUED & SUBMITTED in St. Louis** to Judges William Jay Riley, Lavenski R. Smith, Jane Kelly on 09/11/2014 Ms.

Susan R. Oxford for Appellant EEOC. *** Mr. John H. Mathias, Jr. for Appellee CRST Van Expedited, Inc. *** Rebuttal by Ms. Susan Ruth Oxford for EEOC. RECORDED [4195723] [13-3159] (MER)

12/22/2014 OPINION FILED - THE COURT: William Jay Riley, Lavenski R. Smith and Jane Kelly AUTHORING JUDGE: Lavenski R. Smith (PUBLISHED) [4228272] [13-3159] (MDS)

12/22/2014 **JUDGMENT FILED** - The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion.. WILLIAM JAY RILEY, LAVENSKI R. SMITH and JANE KELLY Hrg Sep 2014 [4228283] [13-3159] (MDS)

02/05/2015 PETITION for *en banc* rehearing and also for rehearing by panel filed by Appellee CRST Van Expedited, Inc. w/service 02/05/2015 [4241707] [13-3159] (JHM)

02/20/2015 JUDGE ORDER: Denying [4241707-2] petition for *en banc* rehearing filed by Appellee CRST Van Expedited, Inc.. The petition for panel rehearing is also denied. PUBLISHED ORDER. [4246599] [13-3159] (MDS)

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02/27/2015	MANDATE ISSUED. [4249006] [13-3159] (MDS)
05/20/2015	U.S. Supreme Court Notice of cert filed in the Supreme Court on 05/19/2015, case No. 14-1375 [4279988] [13-3159] (RLP)
12/04/2015	SUPREME COURT order filed granting cert petition. Order filed on 12/04/2015 in case No.14-1375. [4345258] [13-3159] (AMT)

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RELEVANT DOCKET ENTRIES FROM THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT NO. 10-1682

***

Date Filed	Docket Text
06/01/2010	BRIEF FILED - APPELLANT BRIEF filed by EEOC in 09-3765, 10-1682, w/service 05/28/2010 110 PDF pages, NoAddendum 10 copies. 20,989 words Brief of CRST Van Expedited, Inc. due on 06/28/2010 [3669797] [09-3765, 10-1682](This brief replaced by corrected brief filed 8/12/10)--[Edited 08/13/2010 by LMT] (MDS)

06/01/2010	ADDENDUM filed by Appellant EEOC in 09-3765, 10-1682. 10 copies w/service 05/28/2010 [3669804] [09-3765, 10-1682] (MDS)
06/01/2010	RECORD FILED - Record Part: APLNT/ PET APPENDIX, No. of Volumes: 20 [3669905] [09-3765, 10-1682] (MDS)

***

08/12/2010	BRIEF FILED - CORRECTED BRIEF correcting Doc. No., [3669797-2], brief Appellant/Petitioner Brief. w/service 08/11/2010 111 PDF pages, NoAddendum 10 copies. 20,986 words [3693314] [09-3765, 10-1682] (MDS)
08/31/2010	BRIEF FILED - APPELLEE BRIEF filed by CRST Van Expedited, Inc. in 09-3764, w/service 08/13/2010 67 PDF pages, w/Addendum 10 copies. 12,935 words [3699080] [09-3764, 09-3765, 10-1682] [Brief is for 09-3764] (MDS)
08/31/2010	BRIEF FILED - APPELLEE BRIEF filed by CRST Van Expedited, Inc. in 09-3765, 10-1682, w/service 08/30/2010, NoAddendum 10 copies. 20,221 words Reply brief of Equal Employment Opportunity Commission due on 09/13/2010. [3699203] [09-3765, 10-1682] [Brief is for 09-3765 and 10-1682] (MDS)

Appendix A

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09/09/2010	BRIEF FILED - AMICUS BRIEF filed by Chamber of Commerce of the United States, Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and SOCIETY FOR HUMAN RESOURCE MANAGEMENT in 09-3765, 10-1682 w/service 09/07/2010, NoAddendum 10 copies. 6977 words [3701731] [09-3765, 10-1682] (MDS)

***

09/28/2010	MOTION to substitute Diane G. Reed, Trustee of the Bankruptcy Estate of Monika and Rolfe Starke, Appellant for Appellant Monika Starke., filed by Attorney Mr. Matt J. Reilly for Appellants Ms. Remcey Jeunenne Peeples and Ms. Monika Starke. w/service 09/28/2010. [3707651] [09-3764, 09-3765, 10-1682] (MJR)
10/04/2010	BRIEF FILED - APPELLANT REPLY BRIEF filed by EEOC in 09-3765, 10-1682,. w/service 10/01/2010 55 PDF pages, No Addendum 10 copies. 10,478 words [3709450] [09-3765, 10-1682] [This brief has been replaced by the corrected reply brief filed on 10/7/10. Entry edited by mds.] (MDS)

10/07/2010 RESPONSE in opposition to motion to substitute party, [3707651-2] filed by Attorney Mr. John H. Mathias, Jr. for Appellee CRST Van Expedited, Inc. in 09-3764, 09-3765, 10-1682, w/service 10/07/2010. [3710821] [09-3764, 09-3765, 10-1682] (JHM)

***

10/07/2010 BRIEF FILED - CORRECTED Reply Brief - correcting doc # [3709450-2]. w/ service 10/07/2010 55 PDF pages, No Addendum. 10,489 words Paper briefs from Equal Employment Opportunity Commission due 10/12/2010. [3711125] [09-3765, 10-1682] (MDS)

***

11/18/2010 ARGUED & SUBMITTED in St. Paul to Judges Diana E. Murphy, Lavenski R. Smith, and Duane Benton on 11/18/2010. Mr. Matt J. Reilly for Appellants Ms. Remcey Jeunenne Peeples and Ms. Monika Starke and Mr. John H. Mathias, Jr. for Appellee CRST Van Expedited, Inc. in 09-3764; Ms. Susan Ruth Oxford for Appellant EEOC and Mr. John H. Mathias, Jr. for Appellee CRST Van Expedited, Inc. in 09-3765 and 10-1682. Rebuttal by Ms. Susan Ruth Oxford for

EEOC in 09-3765, 10-1682 RECORDED [3725835] [09-3764, 09-3765, 10-1682] (CBC)

07/15/2011 28(j) citation filed by Appellee CRST Van Expedited, Inc. in 09-3765, 09-3764, 10-1682 w/service 07/15/2011 - FOR CAL. [3808098] [09-3765, 09-3764, 10-1682] (JHM)

07/15/2011 Response of Appellant EEOC in 09-3765, 10-1682 to 28(j) citation, [3808098-2], filed by CRST Van Expedited, Inc. in 09-3765, 09-3764, 10-1682,28(j) citation for Calendar, [3808098-3], filed by CRST Van Expedited, Inc. in 09-3765, 09-3764, 10-1682. w/service 07/15/2011 - FOR CAL. [3808284] [09-3765, 09-3764, 10-1682] (SRO)

02/22/2012 OPINION FILED - THE COURT: DIANA E. MURPHY, LAVENSKI R. SMITH and DUANE BENTON. Lavenski R. Smith, Authoring Judge (PUBLISHED), CONCUR AND DISSENT BY: DIANA E. MURPHY [3882404] [09-3764, 09-3765, 10-1682] OPINION VACATED - SEE ORDER OF MAY 7, 2012--[Edited 05/07/2012 by MER] (SRD)

02/22/2012 **JUDGMENT FILED** - The judgment of the originating court is AFFIRMED in part,

REVERSED in part and REMANDED in accordance with the opinion. DIANA E. MURPHY, LAVENSKI R. SMITH and DUANE BENTON Hrg Nov 2010 [3882417] [09-3764, 09-3765, 10-1682] JUDGMENT VACATED - SEE ORDER OF MAY 7, 2012.--[Edited 05/07/2012 by MER] (SRD)

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04/04/2012 PETITION for enbanc rehearing and also for rehearing by panel filed by Appellants Ms. Remcey Jeunenne Peeples and Ms. Monika Starke in 09-3764 w/service 04/04/2012 [3897593] [09-3764, 09-3765, 10-1682]

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04/09/2012 PETITION for rehearing by panel, for *en banc* rehearing and also for rehearing by panel filed by Appellant EEOC in 09-3765 w/service 04/09/2012 [3898988] [09-3764, 09-3765, 10-1682] (SRO)

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04/26/2012 RESPONSE in opposition to petition for rehearing by panel, [3898988-2], petition for enbanc rehearing, [3898988-3] filed by Attorney Mr. John H. Mathias, Jr. for

Appellee CRST Van Expedited, Inc. in 09-3765, w/service 04/26/2012. [3905488] [09-3765, 09-3764, 10-1682]--[Edited 04/27/2012 by MDS - Reason: Refiled by counsel to correct table of contents.] (JHM)

04/26/2012 RESPONSE in opposition to petition for rehearing by panel, [3898988-2], petition for *en banc* rehearing, [3898988-3], petition for rehearing by panel, [3898988-4] filed by Attorney Mr. John H. Mathias, Jr. for Appellee CRST Van Expedited, Inc. in 10-1682, w/service 04/26/2012. [3905521] [09-3765, 09-3764, 10-1682] (JHM)

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05/07/2012 JUDGE ORDER: The petitions for rehearing by the panel are granted. The opinion and judgment of February 22, 2012, are vacated and the case is reopened. An amended opinion will be filed in due course. The petitions for rehearing *en banc* are denied as moot. The motion of Appellant EEOC for leave to file a reply to the response is denied as moot. PUBLISHED ORDER. Hrg Nov 2010 [3908914] [09-3764, 09-3765, 10-1682] (MER)

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05/08/2012	OPINION FILED - THE COURT: DIANA E. MURPHY, LAVENSKI R. SMITH and DUANE BENTON. Lavenski R. Smith, Authoring Judge (PUBLISHED), CONCUR AND DISSENT BY: DIANA E. MURPHY [3909140] [09-3764, 09-3765, 10-1682] (MDS)
05/08/2012	JUDGMENT FILED - The judgment of the originating court is AFFIRMED in part, REVERSED in part and REMANDED in accordance with the opinion. DIANA E. MURPHY, LAVENSKI R. SMITH and DUANE BENTON Hrg Nov 2010 [3909165] [09-3764, 09-3765, 10-1682] (MDS)
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05/09/2012	PETITION for *en banc* rehearing and also for rehearing by panel filed by Appellant EEOC in 09-3765 w/service 05/09/2012 [3909913] [09-3765, 09-3764, 10-1682] (SRO)
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05/11/2012	RESPONSE in opposition to petition for *en banc* rehearing, [3909913-2], petition for rehearing by panel, [3909913-3] filed by Attorney Mr. John H. Mathias, Jr. for Appellee CRST Van Expedited, Inc. in

09-3764, w/service 05/11/2012. [3910844] [09-3764, 09-3765, 10-1682] (JHM)

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05/18/2012 28(j) citation filed by Appellant EEOC in 09-3765 w/service 05/18/2012 - FOR CAL. [3913463] [09-3765, 09-3764, 10-1682] (SRO)

05/21/2012 28(j) citation filed by Appellant EEOC in 09-3765 w/service 05/21/2012 - FOR CAL. [3913863] [09-3765, 09-3764, 10-1682] (SRO)

05/22/2012 LETTER from Mr. John H. Mathias, Jr. for CRST Van Expedited, Inc. in 09-3765 regarding 28(j) letter of EEOC. w/service 05/22/2012 [3914136] [09-3765, 09-3764, 10-1682]--[Edited 05/22/2012 by MDS - Reason: Refiled by counsel to correct CM/ECF event] (JHM)

05/22/2012 Response of Appellee CRST Van Expedited, Inc. in 09-3765 to 28(j) citation, [3913463-2], filed by EEOC in 09-3765, 09-3764, 10-1682,28(j) citation for Calendar, [3913463-3], filed by EEOC in 09-3765, 09-3764, 10-1682. w/service 05/22/2012 - FOR CAL. [3914259] [09-3765, 09-3764, 10-1682] (JHM)

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05/23/2012	REPLY to response to Petition for Rehearing *En Banc*, [3910844-2], filed by EEOC. w/service 05/04/2012. [3914553] [09-3764, 09-3765, 10-1682] (SRD)
05/25/2012	Response of Appellee CRST Van Expedited, Inc. in 09-3765, 09-3764, 10-1682 to 28(j) citation, [3913863-2], filed by EEOC in 09-3765, 09-3764, 10-1682,28(j) citation for Calendar, [3913863-3], filed by EEOC in 09-3765, 09-3764, 10-1682. w/ service 05/25/2012 - FOR CAL. [3915489] [09-3765, 09-3764, 10-1682] (JHM)
05/25/2012	28(j) citation filed by Appellant EEOC in 09-3765 w/service 05/25/2012 - FOR CAL. [3915681] [09-3765, 09-3764, 10-1682] (SRO)
05/29/2012	Response of Appellee CRST Van Expedited, Inc. in 09-3765 to 28(j) citation, [3915681-2], filed by EEOC in 09-3765, 09-3764, 10-1682,28(j) citation for Calendar, [3915681-3], filed by EEOC in 09-3765, 09-3764, 10-1682. w/service 05/29/2012 - FOR CAL. [3916270] [09-3765, 09-3764, 10-1682] (JHM)
06/08/2012	JUDGE ORDER: The petitions for rehearing *en banc* are denied. The petitions for panel rehearing are also denied. Judges Murphy, Bye and Melloy would

	grant the petitions for rehearing *en banc.* [3909913-2] PUBLISHED ORDER. Hrg Nov 2010 [3920295] [09-3764, 09-3765, 10-1682] (MDS)
06/13/2012	MOTION to stay the mandate, filed by Attorney Ms. Susan Ruth Oxford for Appellant EEOC in 09-3765 w/service 06/13/2012. [3921782] [09-3765, 09-3764, 10-1682] (SRO)
06/19/2012	JUDGE ORDER:Granting [3921782-2] motion to stay the mandate filed by Ms. Susan Ruth Oxford. Hrg Nov 2010 [3923571] [09-3765, 10-1682] (MDS)
09/10/2012	LETTER from Appellee CRST Van Expedited, Inc. in 09-3764, 09-3765, 10-1682, regarding issuance of the mandate. w/service 09/10/2012 [3951260] [09-3764, 09-3765, 10-1682]--[Edited 09/12/2012 by MDS to reflect correct ECF relief.] (JHM)
09/14/2012	MANDATE ISSUED. [3953239] [09-3764, 09-3765, 10-1682] (MDS)

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Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT NORTHERN DISTRICT OF IOWA (CEDAR RAPIDS) CIVIL DOCKET FOR CASE #: 1:07-CV-00095-LRR

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Date Filed	#	Docket Text
09/27/2007	2	COMPLAINT with Jury Demand against CRST Van Expedited Inc, filed by Equal Employment Opportunity Commission. Scheduling Report due by 2/7/2008(Tyndall, Brian) Modified text on 9/28/2007. (mj) (Entered: 09/27/2007)
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11/16/2007	8	AMENDED COMPLAINT against CRST Van Expedited Inc, filed by Equal Employment Opportunity Commission.(Tyndall, Brian) (Entered: 11/16/2007)
		***
11/30/2007	11	*AFFIRMATIVE DEFENSES* AND ANSWER to Amended Complaint by CRST Van Expedited Inc.(Wolle, Thomas) (Entered: 11/30/2007)

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02/08/2008	21	SCHEDULING ORDER AND DISCOVERY PLAN: Initial Disclosures due date of 2/27/08 but not filed with the court. Add Parties Deadline due by 5/1/2008. Amended Pleadings due by 5/1/2008. Plaintiffs Expert Witness due by 8/7/2008. Defendants Expert Witnesses due by 10/7/2008. Plaintiffs Rebuttal Experts due by 11/7/2008. Discovery due by 12/7/2008. Motions due by 1/15/2009. Trial Ready Deadline 5/15/2009. Signed by Magistrate Judge Jon S Scoles on 2/8/08. (Stigler, Karo) (Entered: 02/08/2008)
02/29/2008	22	TRIAL MANAGEMENT ORDER: Witness and exhibit lists exchanged by parties (but not filed) at least 15 court days before FPTC. Exhibits marked. Jury Instructions 10 court days before FPTC. Motions in limine 14 days before FPTC. Proposed Pretrial Order due by 5/12/2009. Final Pretrial Conference set for 5/14/2009 04:00 PM in CR 3rd Fl Ct before Chief Judge Linda R Reade. Jury Trial set for 6/15/2009 09:00 AM in CR 3rd Fl Ct before Chief Judge Linda R Reade. Signed by Chief Judge Linda R Reade on 2/29/2008. (de) (Entered: 02/29/2008)

03/06/2008	23	MOTION for Protective Order *(Defendant CRST Van Expedited, Inc.'s Motion to Amend Stipulation and Protective Order)* by Defendant CRST Van Expedited Inc (Attachments: # 1 Stipulation and Protective Order) (Wolle, Thomas) (Entered: 03/06/2008)
03/07/2008	24	STIPULATION AND PROTECTIVE ORDER (see text). Signed by Magistrate Judge Jon S Scoles on 3/7/2008. (de) (Entered: 03/07/2008)
03/20/2008	25	BRIEF in Opposition re 23 MOTION for Protective Order *(Defendant CRST Van Expedited, Inc.'s Motion to Amend Stipulation and Protective Order) Plaintiff EEOC's Brief in Opposition to Defendant's Motion to Amend Stipulation and Protective Order* filed by Equal Employment Opportunity Commission. (Tyndall, Brian) (Entered: 03/20/2008)
03/25/2008	26	REPLY to Response to Motion re 23 MOTION for Protective Order *(Defendant CRST Van Expedited, Inc.'s Motion to Amend Stipulation and Protective Order)* filed by CRST Van Expedited Inc. (Wolle, Thomas) (Entered: 03/25/2008)

Appendix A

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04/07/2008	31	ORDER granting 23 Motion to Amend Protective Order. (Amended Protective Order will be filed separately.) Signed by Magistrate Judge Jon S Scoles on 4/7/08. (Stigler, Karo) (Entered: 04/07/2008)
04/07/2008	32	AMENDED PROTECTIVE ORDER. (The parties' Stipulation and Protective Order 24 is amended with this entry.) Signed by Magistrate Judge Jon S Scoles on 4/7/08. (Stigler, Karo) (Entered: 04/07/2008)

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05/01/2008	34	MOTION for Leave to File Amended Answer and Affirmative Defenses by Defendant CRST Van Expedited Inc (Attachments: # 1 Proposed Amended Answer and Affirmative Defenses) (Markowski, Robert) (Entered: 05/01/2008)
05/01/2008	35	ORDER granting 34 Motion for Leave to File Amend Answer and Affirmative Defenses. Clerk of Court shall detach and separately docket [34-2]. Signed by Magistrate Judge Jon S Scoles on 5/1/08. (Stigler, Karo) (Entered: 05/01/2008)

05/01/2008	36	AMENDED ANSWER to 8 Amended Complaint by CRST Van Expedited Inc.(jm) (Entered: 05/01/2008)

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09/26/2008	48	ORDER granting 43 Motion to Intervene. The Clerk of Court shall detach and separately docket the Plaintiffs'/Intervenors' Complaint and Jury Demand [43-3]. Signed by Magistrate Judge Jon S Scoles on 9/26/08. (Stigler, Karo) (Entered: 09/26/2008)
09/26/2008	49	Intervener COMPLAINT against CRST Van Expedited Inc filed by Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Monika Starke, Latesha Thomas. Dismissal Deadline 2/6/2009. (pac) (Entered: 09/26/2008)

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10/20/2008	50	ANSWER to Complaint by CRST Van Expedited Inc.(Mathias, John) (Entered: 10/20/2008)

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11/06/2008	56	MOTION Under Rule16(f) for an Order to Show Cause Concerning the EEOC's

Appendix A

		Identification of the Class Members by Defendant CRST Van Expedited Inc (Attachments: # 1 Memorandum in Support of Motion, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11) (Mathias, John) (Additional attachment(s) added on 11/25/2008: # 13 Exhibit 7 (Redacted)) (pac). (Entered: 11/06/2008)
11/07/2008	57	ORDER granting 51 Motion to Strike. Portions of Plaintiffs-Interveners' Complaint (docket no. 49) are stricken. **Parties see text of order.** Signed by Chief Judge Linda R Reade on 11/7/2008. (pac) (Entered: 11/07/2008)
		***
11/12/2008	60	BRIEF in Opposition re 56 MOTION Under Rule16(f) for an Order to Show Cause Concerning the EEOC's Identification of the Class Members filed by Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) (Tyndall, Brian) Modified text on 11/13/2008. (pac) (Additional attachment(s) added

on 11/13/2008: # 6 Certificate of Service) (pac). (Entered: 11/12/2008)

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11/19/2008 66 ORDER entered re 56 Motion to Show Cause. **Parties see text of order.** Signed by Chief Judge Linda R Reade on 11/19/2008. (pac) (Entered: 11/19/2008)

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11/21/2008 68 SUPPLEMENT/ADDENDUM by Equal Employment Opportunity Commission (Tyndall, Brian) (Entered: 11/21/2008)

11/21/2008 69 Transcript of Motion Hearing held on 11/12/2008 before Chief Judge Linda R Reade. Court Reporter Patrice A Murray, Telephone number (319) 286-2324. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/12/2008. Redacted Transcript Deadline set for 12/22/2008. Release of Transcript Restriction set for

2/19/2009. Hard copy housed in Clerk's Office. (pac) (Entered: 11/21/2008)

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11/24/2008	71	MOTION Under Rule 26 For An Expedited Discovery Conference by Defendant CRST Van Expedited Inc (Attachments: # 1 Defendant CRS VAN EXPEDITED, Inc.'s Memorandum Supporting Its Motion Under Rule 26 For An Expedited Discovery Conference, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10) (Mathias, John) (Entered: 11/24/2008)
11/24/2008	72	Response to Motion re 71 MOTION Under Rule 26 For An Expedited Discovery Conference *EEOC's Memorandum in Response to Defemdant Motion for Expedited Discovery Conference* filed by Equal Employment Opportunity Commission. (Tyndall, Brian) (Entered: 11/24/2008)
11/24/2008	73	ORDER granting 71 Motion for an Expedited Discovery Conference. The court shall hold the requested discovery conference at 10:30 a.m. on November

26, 2008 in the Temporary Courthouse in Cedar Rapids, IA. All attorneys of record shall personally appear for the conference. Pltf Equal Employment Opportunity Commission shall email to Diane Leibold and Timothy Vavricek and file under seal a list of all its class members's current addresses on or before Tuesday, November 25, 2008 at 5:00 p.m. Signed by Chief Judge Linda R Reade on 11/24/2008. (de) (Entered: 11/24/2008)

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11/26/2008 76 MOTION to Intervene by Intervenor Plaintiffs Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Monika Starke, Latesha Thomas (Attachments: # 1 Brief in Support of Nicole Cinquemano's Motion to Intervene, # 2 Plaintiff/Intervener's Complaint and Jury Demand) (Reilly, Matthew) Modified text on 12/1/2008. (pac) (Entered: 11/26/2008)

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12/08/2008 82 ORDER granting 76 Motion to Intervene. Clerk of Court shall detach and separately docket the Complaint and Jury Demand (docket #76-3).

Signed by Magistrate Judge Jon S Scoles on 12/8/2008. (pac) Modified text on 12/8/2008. (pac) (Entered: 12/08/2008)

12/08/2008 83 Intervenor COMPLAINT and Jury Demand filed by Nicole Ann Cinquemano against CRST Van Expedited, Inc. (pac) Modified on 12/9/2008 text. (pac) (Entered: 12/08/2008)

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12/11/2008 85 SUPPLEMENT/ADDENDUM to EEOC's Initial Disclosures by Equal Employment Opportunity Commission (Henry, Ann) Modified text on 12/12/2008. (pac) (Entered: 12/11/2008)

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01/06/2009 92 Transcript of Motion Hearing Proceedings held on 11/26/08, before Chief Judge Linda R. Reade. Court Reporter Patrice Murray, Telephone number 319-286-2324. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction.

After that date it may be obtained through PACER. Redaction Request due 1/27/2009. Redacted Transcript Deadline set for 2/6/2009. Release of Transcript Restriction set for 4/6/2009. (lbb) Modified to note hard copy received and placed in file on 1/6/2009 (lbb). (Entered: 01/06/2009)

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01/09/2009 104 MOTION to Compel *CRST Van Expedited, Inc. to Provide Discovery Regarding Sexual Harassment Complaints Received After October 15, 2008* by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Brief, # 2 Declaration) (Henry, Ann) (Entered: 01/09/2009)

01/09/2009 105 ANSWER to 83 Intervenor Complaint And Jury Demand by CRST Van Expedited Inc.(Mathias, John) Modified text on 1/12/2009. (pac) (Entered: 01/09/2009)

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01/22/2009 121 SUPPLEMENT/ADDENDUM to EEOC's List of Class Members and List of Those with whom it Claims

an Attorney-Client Privilege by Equal Employment Opportunity Commission (Henry, Ann) Modified text on 1/23/2009. (pac) (Entered: 01/22/2009)

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01/23/2009 123 BRIEF in Opposition re 104 MOTION to Compel *CRST Van Expedited, Inc. to Provide Discovery Regarding Sexual Harassment Complaints Received After October 15, 2008* (RESPONSE) filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Mathias, John) (Entered: 01/23/2009)

***

01/27/2009 126 REPLY BRIEF to re 104 MOTION to Compel *CRST Van Expedited, Inc. to Provide Discovery Regarding Sexual Harassment Complaints Received After October 15, 2008* filed by Equal Employment Opportunity Commission. (Attachments: # 1 Exhibits 1 and 2) (Henry, Ann) (Entered: 01/27/2009)

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01/29/2009	134	MOTION for Leave to Seek Relief For Class Members Who Were Not Deposed By January 15, 2009 Due To Exceptional Circumstances by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Declaration of Jeanne Szromba, # 2 Brief in Support of Motion) (Szromba, Jeanne) Modified text on 1/30/2009. (pac) (Entered: 01/29/2009)

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102/02/2009	136	MOTION to Bifurcate the Trial and For Trial Management Order by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Brief, # 2 Exhibit 1-3, # 3 Declaration) (Henry, Ann) Modified text on 2/3/2009. (pac) (Entered: 02/02/2009)

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02/06/2009	139	RESISTANCE to Motion re 134 MOTION Leave to Seek Relief For Class Members Who Were Not Deposed By January 15, 2009 Due To Exceptional Circumstances filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7

Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L) (Mathias, John) (Entered: 02/06/2009)

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02/10/2009 143 Minute Entry for proceedings held before Magistrate Judge Jon S Scoles: Motion Hearing held on 2/10/2009 re 104 MOTION to Compel C*RST Van Expedited, Inc. to Provide Discovery Regarding Sexual Harassment Complaints Received After October 15, 2008* filed by Equal Employment Opportunity Commission, 134 MOTION Leave to Seek Relief For Class Members Who Were Not Deposed By January 15, 2009 Due To Exceptional Circumstances filed by Equal Employment Opportunity Commission, 127 MOTION to Compel filed by Equal Employment Opportunity Commission, and 133 MOTION to Compel Discovery filed by Equal Employment Opportunity Commission. All matters taken under advisement. Order to follow. (Court Reporter Kay Carr.) (lbb) (Entered: 02/10/2009)

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02/13/2009 144 MOTION for Summary Judgment *Based on Judicial Estoppel as to the Claims of Class Members Who Have Represented to a Bankruptcy Court That No Such Claim Existed When Their Debts Were Discharged* by Defendant CRST Van Expedited Inc Responses due by 3/9/2009 (Attachments: # 1 Brief in Support of Motion for Summary Judgment, # 2 LR 56(a)(3) Statement of Facts in Support of Motion for Summary Judgment, # 3 Appendix) (Mathias, John) (Entered: 02/13/2009)

02/13/2009 145 SEALED MOTION (Portions unsealed per 158 order) Defendant CRST Van Expdeited, Inc's Motion for Summary Judgment Against the Claims of Certain of the Interveners by CRST Van Expedited Inc. (Attachments: # 1 Brief in Support of Motion for Summary Judgment, # 2 Appendix, # 3 Statement of Material Facts) (Mathias, John) Modified text on 2/17/2009. (pac) Modified text on 3/3/2009 (lbb). (Entered: 02/13/2009)

02/13/2009 146 SEALED MOTION (Portions unsealed per 158 order) Motion for Summary Judgment Based on Class Members' Failure to Report Alleged

Harassment and/or CRST's Prompt and Effective Response to Reported Harassment by CRST Van Expedited Inc (Attachments: # 1 Brief in Support of Motion for Summary Judgment, # 2 LR 56(a)(3) Statement of Facts in Support of Motion for Summary Judgment, # 3 Appendix) (Mathias, John) Modified on text 2/17/2009. (pac) (Entered: 02/13/2009)

02/13/2009 147 SEALED MOTION (Portions unsealed per 158 order) Motion for Summary Judgment Based on Statute of Limitations and Other Grounds by CRST Van Expedited Inc (Attachments: # 1 Brief in Support of Motion for Summary Judgment, # 2 LR 56(a)(3) Statement of Facts in Support of Motion for Summary Judgment, # 3 Appendix) (Mathias, John) Modified on text 2/17/2009. (pac) Modified on 3/3/2009 (lbb). (Additional attachment(s) added on 4/6/2009: # 4 Motion for Summary Judgment Based on Statue of Limitations and Other Grounds, # 5 Brief in Support of Motion for Summary Judgment, # 6 Statement of Facts, # 7 Appendix) (pac). (Entered: 02/13/2009)

Appendix A

02/13/2009	148	SEALED MOTION (Portions unsealed per 158 order) Defendant CRST Van Expedited, Inc.'s Motion For Summary Judgment Against Class Members Who Did Not Experience Severe Or Pervasive Sexual Harassment by CRST Van Expedited Inc (Attachments: # 1 Brief In Support, # 2 Statement of Material Facts Part 1, # 3 Statement of Material Facts Part 2, # 4 Index Of Exhibits, # 5 Appendix Part 1, # 6 Appendix Part 2, # 7 Appendix Part 3, # 8 Appendix Part 4, # 9 Appendix Part 5, # 10 Appendix Part 6, # 11 Appendix Part 7, # 12 Appendix Part 8, # 13 Appendix Part 9, # 14 Appendix Part 10, # 15 Appendix Part 11, # 16 Appendix Part 12, # 17 Appendix Part 13, # 18 Appendix Part 14, # 19 Appendix Part 15, # 20 Appendix Part 16, # 21 Appendix Part 17, # 22 Appendix Part 18, # 23 Appendix Part 19, # 24 Appendix Part 20, # 25 Appendix Part 21, # 26 Appendix Part 22, # 27 Appendix Part 23, # 28 Appendix Part 24, # 29 Appendix Part 25, # 30 Appendix Part 26, # 31 Appendix Part 27, # 32 Appendix Part 28, # 33 Appendix Part 29, # 34 Appendix Part 30, # 35 Appendix Part 31, # 36 Appendix Part 32, # 37 Appendix Part 33, # 38

Appendix Part 34, # 39 Appendix Part 35, # 40 Appendix Part 36) (Mathias, John) Modified on text 2/17/2009. (pac) Modified text on 3/3/2009 (lbb). (Additional attachment(s) added on 3/3/2009: # 41 Revised Index, # 42 Redacted App Part 1, # 43 Redacted App Part 2, # 44 Redacted App Part 3, # 45 Redacted App Part 4, # 46 Redacted App Part 5, # 47 Redacted App Part 6, # 48 Redacted App Part 7, # 49 Redacted App Part 8, # 50 Redacted App Part 9, # 51 Redacted App Part 10, # 52 Redacted App Part 11, # 53 Redacted App Part 12, # 54 Redacted App Part 13, # 55 Redacted App Part 14, # 56 Redacted App Part 15, # 57 Redacted App Part 16, # 58 Redacted App Part 17, # 59 Redacted App Part 18, # 60 Redacted App Part 19, # 61 Redacted App Part 20, # 62 Redacted App Part 21, # 63 Redacted App Part 22, # 64 Redacted App Part 23, # 65 Redacted App Part 24, # 66 Redacted App Part 25, # 67 Redacted App Part 26, # 68 Redacted App Part 27, # 69 Redacted App Part 28, # 70 Redacted App Part 29, # 71 Redacted App Part 30, # 72 Redacted App Part 31, # 73 Redacted App Part 32, # 74 Redacted App Part 33, # 75 Redacted App Part 34) (lbb). Modified per 158

order on 3/3/2009 (lbb). (Entered: 02/13/2009)

02/13/2009 149 SEALED MOTION (Portions unsealed per 158 order) Defendant CRST VAN EXPEDITED, INC.'S Motion For Summary Judgment Against Class Members Whose Claims Fail On Two Or More Grounds by CRST Van Expedited Inc (Attachments: # 1 Brief In Support, # 2 Statement of Material Facts, # 3 Appendix) (Mathias, John) Modified text on 2/17/2009. (pac) Modified text on 3/3/2009 (lbb). (Entered: 02/13/2009)

02/13/2009 150 MOTION for Summary Judgment *On EEOC's Pattern And Practice Claim* by Defendant CRST Van Expedited Inc Responses due by 3/9/2009 (Attachments: # 1 Brief In Support, # 2 Statement of Material Facts, # 3 Index Of Exhibits, # 4 Appendix) (Mathias, John) (Entered: 02/13/2009)

02/17/2009 151 ORDER denying 104 Motion to Compel. Signed by Magistrate Judge Jon S Scoles on 2/17/09. (Stigler, Karo) (Entered: 02/17/2009)

02/19/2009 153 ORDER granting in part and denying in part 127 Motion to Compel and

for Sanctions; granting in part and denying in part 134 Motion for Leave to Seek Relief. Signed by Magistrate Judge Jon S Scoles on 2/19/09. (Stigler, Karo) (Entered: 02/19/2009)

02/19/2009 154 BRIEF in Opposition re 136 MOTION to Bifurcate the Trial and For Trial Management Order filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit A) (Mathias, John) (Entered: 02/19/2009)

02/24/2009 155 REPLY BRIEF to re 136 MOTION to Bifurcate the Trial and For Trial Management Order filed by Equal Employment Opportunity Commission. (Attachments: # 1 Appendix Order in EEOC v. Dial Corp.) (Henry, Ann) (Entered: 02/24/2009)

02/25/2009 156 ORDER denying 136 Motion to Bifurcate/Sever. Signed by Chief Judge Linda R Reade on 02/25/09. (lbb) (Entered: 02/25/2009)

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03/11/2009 159 SUPPLEMENT/ADDENDUM to EEOCS Updated List of Class Members and List of Those with whom it Claims an Attorney-Client

Privlege by Equal Employment Opportunity Commission (Szromba, Jeanne) Modified text on 3/12/2009. (pac) (Entered: 03/11/2009)

03/16/2009 160 RESISTANCE to Motion re 144 MOTION for Summary Judgment *Based on Judicial Estoppel as to the Claims of Class Members Who Have Represented to a Bankruptcy Court That No Such Claim Existed When Their Debts Were Discharged* filed by Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Monika Starke, Latesha Thomas, Nicole Ann Cinquemano. (Tronvold, Jeffrey) (Entered: 03/16/2009)

03/16/2009 161 RESISTANCE to Motion re 145 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against the Claims of Certain of the Interveners filed by Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Monika Starke, Latesha Thomas, Nicole Ann Cinquemano. (Attachments: # 1 Statement of Material Facts, # 2 Response to CRST's Statement of Material Facts, # 3 Appendix) (Tronvold, Jeffrey) Modified text on 3/17/2009. (pac)

(Additional attachment(s) added on 3/17/2009: # 4 Appendix Part 1, # 5 Appendix Part 2) (pac). (Entered: 03/16/2009)

03/16/2009 162 RESISTANCE to Motion re 146 SEALED MOTION Motion for Summary Judgment Based on Class Members' Failure to Report Alleged Harassment and/or CRST's Prompt and Effective Response to Reported Harassment filed by Equal Employment Opportunity Commission. (Attachments: # 1 Local Rule 56(b)(2) Statement, # 2 Local Rule 56(b)(3) Statement, # 3 Local Rule 56(b)(4) Appendix) (Henry, Ann) (Entered: 03/16/2009)

03/16/2009 163 RESISTANCE to Motion re 144 MOTION for Summary Judgment *Based on Judicial Estoppel as to the Claims of Class Members Who Have Represented to a Bankruptcy Court That No Such Claim Existed When Their Debts Were Discharged* filed by Equal Employment Opportunity Commission. (Attachments: # 1 Local Rule 56(2) Statement, # 2 Local Rule 56(b)(3) Statement, # 3 Local Rule 56(b)(4) Appendix) (Henry, Ann) (Entered: 03/16/2009)

03/16/2009	164	RESISTANCE to Motion re 148 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against Class Members Who Did Not Experience Severe or Pervasive Sexual Harassment filed by Equal Employment Opportunity Commission. (Attachments: # 1 LR 56(b)(2) Statement, # 2 LR 56(b)(3) Statement, # 3 Appendix LR 56(b)(4)) (Szromba, Jeanne) (Entered: 03/16/2009)
03/16/2009	165	RESISTANCE to Motion re 147 SEALED MOTION Motion for Summary Judgment Based on Statute of Limitations and Other Grounds filed by Equal Employment Opportunity Commission. (Attachments: # 1 Local Rule 56(b)(2) Statement, # 2 Local Rule 56(b)(3) Statement, # 3 Local Rule 56(b)(4) Appendix) (Henry, Ann) (Entered: 03/16/2009)
03/16/2009	166	RESISTANCE to Motion re 149 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against Class Members Whose Claims Fail on Two or More Grounds filed by Equal Employment Opportunity Commission. (Attachments: # 1 LR

56(b)2) Statement, # 2 LR 56(b)(3) Statement, # 3 STRICKEN per order filed 4/13/2009 Appendix LR 56(b)(4) part 1, # 4 STRICKEN Appendix LR 56(b)(4) part 2, # 5 STRICKEN Appendix LR 56(b)(4) part 3, # 6 STRICKEN Appendix LR 56(b)(4) part 4, # 7 STRICKEN Appendix LR 56(b)(4) part 5, # 8 STRICKEN Appendix LR 56(b)(4) part 6, # 9 STRICKEN Appendix LR 56(b)(4) part 7, # 10 STRICKEN Appendix LR 56(b)(4) part 8) (Szromba, Jeanne) (Additional attachment(s) added on 3/20/2009: # 11 STRICKEN Index of Exhibits) (pac). Modified on 4/13/2009 (de). (Additional attachment(s) added on 4/17/2009: # 12 Corrected Appendix Part 1, # 13 Corrected Appendix Part 2, # 14 Corrected Appendix Part 3, # 15 Corrected Appendix Part 4, # 16 Corrected Appendix Part 4-2, # 17 Corrected Appendix Part 5, # 18 Corrected Appendix Part 6, # 19 Corrected Appendix Part 7, # 20 Corrected Appendix Part 8) (pac). (Entered: 03/16/2009)

03/16/2009 168 RESISTANCE to Motion re 150 MOTION for Summary Judgment On EEOC's Pattern And Practice Claim filed by Equal Employment

Opportunity Commission. (Attachments: # 1 response to facts - **STRICKEN PER 190 ORDER**, # 2 additional facts)(Appendix for this resistance is filed at docket entries 169 and 170 (Szromba, Jeanne) Modified text and links per bjb on 3/18/2009 (ksy). Modified text on 4/13/2009. (pac) (Additional attachment(s) added on 4/17/2009: # 3 Corrected Statement of Additional Material Facts) (pac). (Additional attachment(s) added on 4/17/2009: # 4 Corrected Response to CRST's Statement of Undisputed Facts) (pac). (Additional attachment(s) added on 4/17/2009: # 5 Corrected Statement of Additional Material Facts) (pac). (Entered: 03/16/2009)

03/17/2009 170 **STRICKEN per order filed 4/13/2009** APPENDIX (Parts 1, 2 and 4) to 168 Resistance to Motion by Equal Employment Opportunity Commission (Attachments: # 1 Appendix Part 1, # 2 Appendix Part 2, # 3 Appendix Part 4, # 4 Index to Appendix) (Tyndall, Brian) Modified text on 3/18/2009 (ksy). (Additional attachment(s) added on 3/20/2009: # 5 Declaration of Michael Campion, PhD) (pac). Modified on 4/13/2009 (de). (Additional attachment(s) added on 4/17/2009: #

6 Corrected Appendix Part 2) (pac). (Additional attachment(s) added on 4/17/2009: # 7 Corrected Appendix Part 1) (pac). (Additional attachment(s) added on 4/17/2009: # 8 Corrected Appendix Part 4, # 9 Corrected Index to Appendix) (pac). (Entered: 03/17/2009)

03/19/2009 171 MOTION to Strike from *EEOC's List of Class Members (159) Individuals Who Did Not Appear for Depositions by January 15, 2009.* by Defendant CRST Van Expedited Inc Responses due by 4/6/2009 (Mathias, John) Modified on 3/20/2009 to create link. (pac) (Additional attachment(s) added on 3/20/2009: # 1 Brief in Support) (pac). (Entered: 03/19/2009)

03/19/2009 172 BRIEF in Support re 171 MOTION to Strike *from EEOC's List of Class Members (159) Individuals Who Did Not Appear for Depositions by January 15, 2009.* filed by CRST Van Expedited Inc. (Mathias, John) Modified on 3/20/2009 to create link. (pac) (Entered: 03/19/2009)

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03/26/2009	175	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Motion Hearing Proceedings held on 2/10/2009 before Magistrate Judge Jon S Scoles. Court Reporter Kay Carr, Telephone number (319) 362-1543. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/16/2009. Redacted Transcript Deadline set for 4/27/2009. Release of Transcript Restriction set for 6/24/2009. (NEF to court reporter) (pac) Modified on 3/26/2009 to indicate service. (pac) *Hard copy received in Clerk's Office (Entered: 03/26/2009)*

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03/31/2009	178	REPLY to Response to Motion re 144 MOTION for Summary Judgment *Based on Judicial Estoppel as to the Claims of Class Members Who Have Represented to a Bankruptcy Court That No Such Claim Existed When Their Debts Were Discharged* filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 03/31/2009)

03/31/2009 179 REPLY to Response to Motion re 149 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against Class Members Whose Claims Fail on Two or More Grounds filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 03/31/2009)

03/31/2009 180 REPLY to Response to Motion re 147 SEALED MOTION Motion for Summary Judgment Based on Statute of Limitations and Other Grounds filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 03/31/2009)

03/31/2009 181 REPLY to Response to Motion re 145 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against the Claims of Certain of the Interveners filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 03/31/2009)

03/31/2009 182 RESPONSE re 161 Resistance to Motion,, *(Response to Plaintiffs/ Interveners' Statement of Additional Material Facts Which Preclude Entry of Summary Judgment)* by CRST Van Expedited Inc (Mathias, John) (Entered: 03/31/2009)

03/31/2009	183	REPLY to Response to Motion re 148 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against Class Members Who Did Not Experience Severe or Pervasive Sexual Harassment filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 03/31/2009)
03/31/2009	184	RESPONSE re 166 Resistance to Motion,, *(Response to Plaintiff EEOC's Omnibus LR 56(B)(3) Statement of Additional Facts)* by CRST Van Expedited Inc (Mathias, John) (Entered: 03/31/2009)
03/31/2009	185	REPLY to Response to Motion re 150 MOTION for Summary Judgment *On EEOC's Pattern And Practice Claim* filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Statement of Material Facts (Response to EEOC'S Statement of Additional Material Facts Which Preclude Summary Judgment on EEOC'S Pattern or Practice Claim)) (Mathias, John) (Entered: 03/31/2009)
03/31/2009	186	REPLY to Response to Motion re 146 SEALED MOTION Motion for Summary Judgment Based on Class Members' Failure to Report

Appendix A

Alleged Harassment and/or CRST's Prompt and Effective Response to Reported Harassment filed by CRST Van Expedited Inc. (Attachments: # 1 Appendix Supplemental Appendix of Documents Cited in CRST Van Expedited, Inc.'s Reply Briefs and Response to Statement of Additional Facts) (Mathias, John) (Entered: 03/31/2009)

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04/03/2009 187 BRIEF IN RESISTANCE to 171 Defendant's Motion to Strike from EEOC's List of Class Members Individuals Who Did Not Appear for Depositions by January 15, 2009 by Plaintiff Equal Employment Opportunity Commission. Responses due by 4/20/2009 (Kamp, Jean) Modified text and event on 4/3/2009 (ksy). (Entered: 04/03/2009)

04/07/2009 188 MOTION for Leave to File Surreply to 147 Motion for Summary Judgment Based on Statute of Limitations and Other Grounds by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Brief, # 2 Statement of Material Facts, # 3 Appendix) (Kamp, Jean) Modified text on 4/8/2009. (pac) (Entered: 04/07/2009)

04/10/2009 189 REPLY BRIEF re 171 MOTION to Strike "*EEOC's Response to Defendant CRST Van Expedited, Inc.'s Motion to Strike from EEOC's List of Class Members Individuals Who Did Not Appear for Depositions by January 15, 2009* filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Mathias, John) (Entered: 04/10/2009)

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04/13/2009 191 ORDER granting 188 Motion for Leave to File Surreply in Opposition to CRST's Motion for Summary Judgment. The Clerk of Court shall detach and separately docket the documents attached to the instant motion. Signed by Magistrate Judge Jon S Scoles on 4/13/09. (Stigler, Karo) (Entered: 04/13/2009)

04/14/2009 192 SURREPLY BRIEF in Opposition re 147 SEALED MOTION for Summary Judgment Based on Statute of Limitations and Other Grounds filed by Equal Employment Opportunity Commission. (Attachments: # 1 Statement of Material Facts, # 2 Appendix) (Filed by Clerk per 191 Order) (pac) Modified text on 4/15/2009. (pac) (Entered: 04/14/2009)

04/16/2009	193	ORDER granting in part and denying in part 171 Motion to Strike. **Parties see text of order.** Signed by Magistrate Judge Jon S Scoles on 4/16/2009. (pac) (Entered: 04/16/2009)

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04/21/2009	194	BRIEF in Support re 150 MOTION for Summary Judgment *On EEOC's Pattern And Practice Claim (SUR-REPLY)* filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 04/21/2009)
04/23/2009	195	*FILED IN ERROR* OBJECTIONS re 193 Order on Motion to Strike by Equal Employment Opportunity Commission (Kamp, Jean) Modified on 4/23/2009 to note this should have been filed as an Appeal of a Magistrate Judge's Decision. Party to re-file. (pac) (Entered: 04/23/2009)
04/23/2009	196	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Equal Employment Opportunity Commission re 193 Order on Motion to Strike (Kamp, Jean) (Entered: 04/23/2009)
04/30/2009	197	ORDER granting 150 Motion for Summary Judgment. To the extent

that the EEOC asserts a "pattern or practice claim" in this litigation against CRST, such claim is **DISMISSED WITH PREJUDICE.** The EEOC shall pay CRST's ordinary costs. CRST may file its request for costs **10 court days** after the disposition of the entire case. **Parties see text of order.** Signed by Chief Judge Linda R Reade on 4/30/2009. (pac) (Entered: 04/30/2009)

04/30/2009 198 ORDER overruling 196 Objections to Ruling on Motion to Strike. Signed by Chief Judge Linda R Reade on 4/30/2009. (pac) (Entered: 04/30/2009)

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05/08/2009 217 MOTION for Leave to File Motion For Order To Show Cause Why Plaintiff EEOC's Section 706 Claims On Behalf Of Allegedly Aggrieved Persons Should Not Be Dismissed by Defendant CRST Van Expedited Inc (Attachments: # 1 Motion For Order To Show Cause Why Plaintiff EEOC's Section 706 Claims On Behalf Of Allegedly Aggrieved Persons Should Not Be Dismissed For Failure To Exhaust Administrative Remedies, # 2 Brief Supporting Motion For Order To Show Cause Why Plaintiff EEOC's Section 706 Claims

Appendix A

On Behalf Of Allegedly Aggrieved Persons Should Not Be Dismissed For Failure To Exhaust Administrative Remedies, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6) (Mathias, John) (Entered: 05/08/2009)

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05/11/2009 221 ORDER granting 217 Motion for Leave to File Motion for Order to Show Cause.Resistances to the pending Motion for Order to Show Cause are due on or before 5/15/2009 at 5:00 p.m. The Clerk of Court shall detach and file the Motion for Order to Show Cause (docket no. 217-2) and its attachments. The FPTC presently scheduled for 5/14/2009 at 4 p.m. is continued to 6/3/2009 at 1:00 p.m. in the Temporary Courthouse at Cedar Rapids, IA. Signed by Chief Judge Linda R Reade on 5/11/2009. (de) (Entered: 05/11/2009)

05/11/2009 222 MOTION for Order to Show Cause why Pltf EEOC's Section 706 Claims on Behalf of Allegedly Aggrieved Persons Should Not Be Dismissed by Defendant CRST Van Expedited Inc. (Attachments: # 1 Brief in Support, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit

3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6) (de) (Entered: 05/11/2009)

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05/11/2009 223 ORDER Granting in Part and Denying in Part re 147 SEALED MOTION for Summary Judgment Based on Statute of Limitations and Other Grounds filed by CRST Van Expedited Inc. The EEOC is ordered to file an updated list of allegedly aggrieved person for which it intends to seek relief at trial on or before 5/12/2009, at 5 p.m. (see text of order). Signed by Chief Judge Linda R Reade on 5/11/2009. (de) (Entered: 05/11/2009)

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05/12/2009 224 SUPPLEMENT/ADDENDUM re 223 Order, by Equal Employment Opportunity Commission (Henry, Ann) (Entered: 05/12/2009)

05/13/2009 225 ORDER granting 144 Motion for Summary Judgment. Ms. Starke is dismissed with prejudice from the instant lawsuit. The EEOC is barred from seeking relief in this action on behalf of Ms. Payne and Ms. Timmons. The EEOC is ordered to file

an updated list of allegedly aggrieved persons for which it intends to seek relief at trial on or before 5/14/2009, at 5 p.m. Ms. Starke and the EEOC shall pay CRST's ordinary costs. CRST may file its request for costs 10 court days after the disposition of the entire case. Now that CRST is a prevailing party as to Ms. Starke, CRST may file an application for attorneys' fees from Ms. Starke within 20 court days after disposition of the entire case. Signed by Chief Judge Linda R Reade on 5/13/2009. (de) (Entered: 05/13/2009)

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05/14/2009 228 SUPPLEMENT/ADDENDUM to EEOC's Updated List of Class Members and List of Those with whom it Claims an Attorney-Client Privilege re 225 Order on Motion for Summary Judgment by Equal Employment Opportunity Commission (Henry, Ann) Modified text on 5/15/2009. (pac) (Entered: 05/14/2009)

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05/15/2009 229 RESISTANCE to Motion re 222 MOTION for Order to Show Cause filed by Equal Employment Opportunity

Commission. (Attachments: # 1 Exhibit Bloomer Declaration) (Szromba, Jeanne) (Entered: 05/15/2009)

05/15/2009 230 Response to Motion re 222 MOTION for Order to Show Cause *Why Plaintiff EEOC'S Section 706 Claims on Behalf of Allegedly Aggrieved Persons Should Not be Dismissed for Failure to Exhaust Administrative Remedies* filed by Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Latesha Thomas, Nicole Ann Cinquemano. (Attachments: # 1 Exhibit) (Reilly, Matthew) (Entered: 05/15/2009)

05/15/2009 231 MOTION to Amend/Correct *Complaints* by Intervenor Plaintiffs Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Latesha Thomas, Nicole Ann Cinquemano (Attachments: # 1 Exhibit Plaintiff/Intervener Nicole Ann Cinquemano's Amended Complaint and Jury Demand, # 2 Exhibit Plaintiffs/Interveners' First Amended Complaint and Jury Demand) (Tronvold, Jeffrey) (Entered: 05/15/2009)

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05/18/2009 233 ORDER granting 222 Motion for Order to Show Cause. Evidentiary Hearing set for 6/1/2009 at 9:00 a.m. Under separate cover, the court shall send the parties a chart to complete before the evidentiary hearing. Completed chart as well as witness and exhibit lists shall be filed on or before 5/29/2009 at 5:00 p.m. (see text). Discovery reopened for limited purposes (see text). Discovery shall close on 5/26/2009. Final Pretrial Conference is reset to 6/15/2009 at 9:00 a.m. Signed by Chief Judge Linda R Reade on 5/18/2009. (de) Modified on 7/9/2009 (bjb). (Entered: 05/18/2009)

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05/19/2009 234 ORDER re 231 MOTION to Amend/ Correct Complaints filed by Cindy Moffett, Remcey Jeunenne Peeples, Barbara Grant, Janet Boot, Latesha Thomas, Nicole Ann Cinquemano and 232 MOTION for Extension of Time Deadline to Amend Pleadings filed by Cindy Moffett, Remcey Jeunenne Peeples, Barbara Grant, Janet Boot, Latesha Thomas, Nicole Ann Cinquemano. CRST shall file its responses by 5/21/2009. Signed by Magistrate Judge Jon S Scoles on 5/19/2009. (pac) (Entered: 05/19/2009)

Appendix A

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05/22/2009 237 SUPPLEMENT/ADDENDUM to EEOC's Updated List of Class Members and List of Those with whom it Claims an Attorney-Client Privilege by Equal Employment Opportunity Commission (Henry, Ann) Modified text on 5/26/2009 (pac). (Entered: 05/22/2009)

05/22/2009 238 ORDER granting 235 Motion to Amend Certain Pretrial Deadlines. Deadline to file replies in support of motions in limine reset to 6/10/2009. Other extensions will be established by further order. Signed by Magistrate Judge Jon S Scoles on 5/22/2009. (bjb) (Entered: 05/22/2009)

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05/22/2009 239 ORDER granting 231 Motion to Amend Complaints. The Motion for Leave to Amend the Complaints shall be deemed timely filed; granting 232 Motion to Enlarge Deadline to Amend Pleadings. The Clerk of Court shall detach and separately docket Nicole Ann Cinquemano's Amended Complaint and Jury Demand; and shall detach and separately docket the

Plaintiffs/Intervenors' First Amended Complaint and Jury Demand. Signed by Magistrate Judge Jon S Scoles on 5/22/09. (ksy) (Entered: 05/22/2009)

05/22/2009 240 AMENDED Intervenor COMPLAINT With Jury Demand, filed by Nicole Ann Cinquemano. (ksy) (Entered: 05/22/2009)

05/22/2009 241 FIRST AMENDED Intervenor COMPLAINT With Jury Demand, filed by Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Latesha Thomas. (ksy) (Entered: 05/22/2009)

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05/29/2009 243 Exhibit List For The Hearing On CRST Van Expedited, Inc.'s Motion For Order To Show Cause by CRST Van Expedited Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H) (Mathias, John) (Entered: 05/29/2009)

05/29/2009 244 Exhibit List for: Hearing on Defendant's Motion for Order to Show Cause by Equal Employment Opportunity Commission.. (Attachments: # 1

Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34) (Henry, Ann) Modified text on 6/1/2009 (pac). (Entered: 05/29/2009)

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06/01/2009 248 Minute Entry for proceedings held before Chief Judge Linda R Reade: Evidentiary Hearing held on 6/1/2009. Final Pretrial Conference and Trial dates are cancelled. Parties to meet and confer as to new trial date in early 2010. Court will hold scheduling conference after it rules on the pending motions, other than the motions in limine. Order to follow. (Court Reporter Patrice Murray)

(pac) Modified text on 6/1/2009 (pac). (Entered: 06/01/2009)

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06/02/2009 249 ORDER granting in part and denying in part 145 Motion for Summary Judgment Against the Claims of Certain of the Interveners filed by CRST Van Expedited Inc. Janet Boot and Remcey Jeunenne Peeples are dismissed from this lawsuit with prejudice. Set Deadline: Check Status Deadline for EEOC's updated list of allegedly aggrieved persons for which it intends to seek relief at trial due by 6/4/2009 at 5:00 PM. Motions terminated: 145 Motion for Summary Judgment Against the Claims of Certain of the Interveners filed by CRST Van Expedited Inc. **Parties see text of order for further instructions and specifics.** Signed by Chief Judge Linda R Reade on 6/2/2009. (pac) (Entered: 06/02/2009)

06/04/2009 250 SUPPLEMENT/ADDENDUM re 249 Order: EEOC's Updated List of Class Members and List of Those with whom it Claims an Attorney-Client Privilege by Equal Employment Opportunity Commission (Tyndall, Brian) Modified

text on 6/5/2009 (pac). (Entered: 06/04/2009)

06/18/2009 251 ORDER re 146 SEALED Motion for Summary Judgment Based on Class Members' Failure to Report Alleged Harassment and/or CRST's Prompt and Effective Response to Reported Harassment filed by CRST Van Expedited Inc., **granted in part and denied in part**. The EEOC is **BARRED** from seeking relief at trial on behalf of 15 women (see text). The EEOC is **PARTIALLY BARRED** from seeking rellief at trial on behalf of Mss. Pamela Barlow, Peggy Blake, Donna Dickson, Nicole Edwards, Zelestine Grant, Martha Griffin, Carole Pettit and Rhonda Wellman (see text). The court declines to bar the EEOC from seeking full relief at trial on behalf of Mss. Belinda Bedford, Mary Bender, Lillie Bingaman, Darleaner Deese, Cynthia Fisk, Robryna Fitch, Pamela Hoffman and Bobbi O'Dell. The EEOC is **ORDERED** to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before 6/22/2009, at 5 p.m.**. Signed by Chief Judge Linda R Reade on 6/18/2009. (de) (Entered: 06/18/2009)

Appendix A

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06/22/2009	252	SUPPLEMENT/ADDENDUM to EEOC's Updated List of Class Members and List of those with whom it Claims an Attorney-Client Privilege pursuant to 251 Order by Equal Employment Opportunity Commission. (Henry, Ann) Modified text on 6/23/2009 (pac). (Entered: 06/22/2009)
06/24/2009	253	TRIAL MANAGEMENT ORDER: Witness and exhibit lists exchanged by parties (but not filed) at least 15 court days before FPTC. Exhibits marked. Jury Instructions 10 court days before FPTC. Motions in limine 10 days before FPTC. Jury Trial set for 2/1/2010 09:00 AM in CR at Temporary Court Site 4200 C St SW before Chief Judge Linda R Reade. Final Pretrial Conference set for 1/20/2010 08:00 AM in CR at Temporary Court Site 4200 C St SW, Courtroom One, before Chief Judge Linda R Reade. Proposed Pretrial Order due by 1/18/2010. Signed by Chief Judge Linda R Reade on 6/24/2009. (de) Modified text on 6/25/2009 (pac). (Entered: 06/24/2009)

06/25/2009 254 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Motion for Order to Show Cause Proceedings held on 6/1/2009, before Chief Judge Linda R. Reade. Court Reporter Patrice Murray, Telephone number 319/286-2324. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/16/2009. Redacted Transcript Deadline set for 7/27/2009. Release of Transcript Restriction set for 9/23/2009. (de) Modified text on 6/26/2009 (pac). (Entered: 06/25/2009)

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07/06/2009 256 ORDER granting in part and denying in part in that The EEOC is barred from seeking relief at trial on behalf of eleven allegedly aggrieved persons. The Court declines to bar the EEOC from seeking full relief at trial on behalf of eight allegedly aggrieved persons. The EEOC is ordered to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial on or before 7/9/09 at 5:00pm. RE: 148 Sealed Motion. Signed

by Chief Judge Linda R Reade on 07/06/09. (skm) (Entered: 07/06/2009)

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07/08/2009 257 SUPPLEMENT/ADDENDUM to EEOC's Updated List of Class Members and List of those with whom it Claims an Attorney-Client Privilege re 256 Order on Sealed Motion, by Equal Employment Opportunity Commission. (Henry, Ann) Modified text on 7/9/2009 (pac). (Entered: 07/08/2009)

07/09/2009 258 ORDER granting in part and denying in part ***(See Text of Order)*** 149 SEALED MOTION Defendant CRST Van Expedited, Inc's Motion for Summary Judgment Against Class Members Whose Claims Fail on Two or More Grounds filed by CRST Van Expedited Inc. The EEOC is directed to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before 7/13/2009, at 5 p.m.** Signed by Chief Judge Linda R Reade on 7/9/2009. (bjb) (Entered: 07/09/2009)

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07/13/2009	260	SUPPLEMENT/ADDENDUM to EEOC's Updated List of Class Members and List of those with whom it Claims an Attorney-Client Privilege pursuant to 258 Order by Equal Employment Opportunity Commission. (Henry, Ann) Modified text on 7/14/2009 (pac). (Entered: 07/13/2009)
07/17/2009	261	ORDER re 242 Allegedly Aggrieved Persons Chart filed by Equal Employment Opportunity Commission. Parties shall file the Amended Allegedly Aggrieved Persons Chart on or before 7/23/2009 at 5:00 PM. **See order for particulars.** Signed by Chief Judge Linda R Reade on 7/17/2009. (pac) (Entered: 07/17/2009)
07/23/2009	262	SUPPLEMENT/ADDENDUM to EEOC's Allegedly Aggrieved Persons Chart re 261 Order by Equal Employment Opportunity Commission (Henry, Ann) Modified text on 7/24/2009 (pac). (Entered: 07/23/2009)
08/13/2009	263	ORDER dismissing 8 Amended Complaint filed by Equal Employment Opportunity Commission. The EEOC shall pay CRST's ordinary costs. CRST may file its request for costs

10 court days after the disposition of the entire case. Now that CRST is a prevailing party as to the EEOC, 42 USC Section 2000e5(k), CRST may file an application for attorneys' fees from the EEOC within 20 court days after disposition of the entire case. Formal judgment shall not enter against the EEOC and in favor of CRST until the court enters judgment on the pending claims of the remaining Plaintiffs-Interveners. Signed by Chief Judge Linda R Reade on 8/13/2009. (de) (Entered: 08/13/2009)

08/13/2009 264 ORDER - The court has now resolved all pending motions in this matter. Regular motion practice may resume. Deft and the remaining four Plaintiffs-Interveners are directed to contact US Magistrate Judge Scoles to schedule settlement conferences. A separate settlement conference shall be conducted for each Plaintiff-Intervener. Signed by Chief Judge Linda R Reade on 8/13/2009. (copy to JSS chambers) (de) (Entered: 08/13/2009)

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Appendix A

10/01/2009	279	JUDGMENT in favor of CRST Van Expedited Inc against Equal Employment Opportunity Commission. Signed by Clerk on 10/1/2009. (pac) (Entered: 10/01/2009)
10/16/2009	280	BILL OF COSTS by CRST Van Expedited Inc Responses due by 11/5/2009 (Attachments: # 1 Schedule A, # 2 Schedule B, # 3 Schedule C, # 4 Schedule D) (Mathias, John) (Entered: 10/16/2009)

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10/30/2009	282	MOTION for Attorney Fees *And Costs* by Defendant CRST Van Expedited Inc (Attachments: # 1 Attachment 1, # 2 Attachment 2A Part 1, # 3 Attachment 2A Part 2, # 4 Attachment 2A Part 3, # 5 Attachment 2A Part 4, # 6 Attachment 2A Part 5, # 7 Attachment 2B, # 8 Attachment 3, # 9 Attachment 4, # 10 Attachment 5, # 11 Attachment 6, # 12 Attachment 7, # 13 Attachment 7A, # 14 Attachment 7B, # 15 Attachment 7C, # 16 Attachment 7D, # 17 Attachment 7E, # 18 Attachment 7F, # 19 Attachment 7G, # 20 Attachment 7H, # 21 Attachment 7I, # 22 Petition In Support Of Its Motion For Attorneys' Fees And

Costs) (Mathias, John) (Additional attachment(s) added on 11/5/2009: # 23 Exhibit A, # 24 Exhibit B) (skm). (Entered: 10/30/2009)

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11/02/2009	285	EEOC's Resistance to 282 Defendant CRST's Bill of Costs by Equal Employment Opportunity Commission (Attachments: # 1 Exhibit EEOC Table of Objections to CRST's Bill of Costs, Schedule B) (Pladson, Nicholas) Modified on 11/3/2009 to create link (pac). (Entered: 11/02/2009)
11/04/2009	286	SUPPLEMENT/ADDENDUM 285 Objections, by Equal Employment Opportunity Commission (Attachments: # 1 Supplement EEOC's Resistance to Defendant CRST's Bill of Costs) (Pladson, Nicholas) (Entered: 11/04/2009)
11/04/2009	287	MOTION for Leave to File An Amended Chart And March 2009 Invoice In Support Of Its Motion For Attorneys' Fees And Costs by Defendant CRST Van Expedited Inc (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Mathias, John) (Entered: 11/04/2009)

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11/04/2009	289	ORDER granting 287 Motion for Leave to File an Amended Chart and March 2009 Invoice in Support of its Motion for Attorneys' Fees and Costs. The Clerk of Court shall detach and separately docket Exhibit A and Exhibit B attached to the instant motion. Signed by Magistrate Judge Jon S Scoles on 11/04/09. (skm) Modified on 11/5/2009 to note that Exhibits A and B at 287 Motion have been attached to the Motion at 282 (skm). (Entered: 11/04/2009)
11/09/2009	290	SUPPLEMENT Re 282 Motion for Atty Fees by CRST Van Expedited Inc (Attachments: # 1 March 2009 Invoice) (de) Modified on 11/19/2009 (de). (Entered: 11/09/2009)

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11/12/2009	292	REPLY BRIEF to *EEOC's Resistance To Defendant CRST's Bill Of Costs* filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Mathias, John) (Entered: 11/12/2009)

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11/13/2009 294 BRIEF in Reply to Resistance re 282 MOTION for Attorney Fees *And Costs* filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (de) (Entered: 11/13/2009)

11/16/2009 295 RESISTANCE to Motion re 282 MOTION for Attorney Fees *And Costs* filed by Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit A) (Szromba, Jeanne) (Entered: 11/16/2009)

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11/30/2009 297 NOTICE OF APPEAL by Remcey Jeunenne Peeples, Monika Starke. Filing fee $ 455, receipt number 0862-916471. (Tronvold, Jeffrey) (Entered: 11/30/2009)

11/30/2009 298 NOTICE OF APPEAL by Equal Employment Opportunity Commission. (Attachments: # 1 Appellant's Form A) (Kamp, Jean) Modified text on 12/1/2009 (ksy). (Entered: 11/30/2009)

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11/30/2009 300 REPLY to Response to Motion re 282 MOTION for Attorney Fees And Costs filed by CRST Van Expedited

Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (Mathias, John) (Entered: 11/30/2009)

12/01/2009 303 Costs Taxed-*Memorandum* in favor of CRST Van Expedited, Inc against Equal Employment Opportunity Commission in the amount of $ 92,842.21. Signed by Robert L Phelps, Clerk of Court on 12/01/09. (skm) (Entered: 12/02/2009)

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12/02/2009 302 JUDGMENT in favor of CRST Van Expedited Inc against Plaintiff-Interveners Janet Boot, Monika Starke, and Remcey Jeunenne Peeples. See **orders at 225 and 249** Signed by Clerk on 12/2/2009. (pac) (Entered: 12/02/2009)

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12/03/2009 308 USCA Case Number 09-3764 for 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples. (ksy) (Entered: 12/10/2009)

12/08/2009 306 MOTION For Review Of The Clerk's Taxation Of Costs by Defendant CRST

Van Expedited Inc (Attachments: # 1 Brief In Support Of Its Motion For Review Of The Clerk's Taxation Of Costs, # 2 Exhibit A) (Mathias, John) (Entered: 12/08/2009)

12/10/2009 307 USCA Case Number 09-3765 for 298 Notice of Appeal filed by Equal Employment Opportunity Commission. (ksy) (Entered: 12/10/2009)

12/14/2009 309 SUPPLEMENT TO 298 NOTICE OF APPEAL by Equal Employment Opportunity Commission. Appeal Record/Case Number due by 12/14/2009. (Kamp, Jean) Modified text and link on 12/14/2009 (ksy). (Entered: 12/14/2009)

12/14/2009 310 RESISTANCE to Motion re 306 MOTION For Review Of The Clerk's Taxation Of Costs filed by Equal Employment Opportunity Commission. (Pladson, Nicholas) (Entered: 12/14/2009)

12/17/2009 311 AMENDED Notice of Appeal RE: 297 Notice of Appeal by Intervenor Plaintiffs Remcey Jeunenne Peeples, Monika Starke (Attachments: # 1 Amended and Substituted Notice of Appeal) (Reilly, Matthew) (Entered: 12/17/2009)

Appendix A

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12/18/2009	312	REPLY to Response to Motion re 306 MOTION For Review Of The Clerk's Taxation Of Costs filed by CRST Van Expedited Inc. (Mathias, John) (Entered: 12/18/2009)
12/21/2009	313	MOTION for Leave to File Supplemental Statement by Defendant CRST Van Expedited Inc (Attachments: # 1 Supplemental Statement to Fee Petition) (Mathias, John) (Entered: 12/21/2009)
12/22/2009	314	ORDER granting 313 Motion for Leave to File Supplemental Statement. Signed by Magistrate Judge Jon S Scoles on 12/22/09. (Stigler, Karo) (Entered: 12/22/2009)
12/22/2009	315	SUPPLEMENT/ADDENDUM 282 MOTION for Attorney Fees And Costs by CRST Van Expedited Inc. (ksy) (Entered: 12/22/2009)
12/22/2009	316	USCA Case Number 09-3764 and 09-3765 for 298 Notice of Appeal filed by Equal Employment Opportunity Commission, 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples. (Attachments: #

1 8th Circuit Correspondence)(ksy) (Entered: 12/22/2009)

12/23/2009 317 SECOND AMENDED Notice of Appeal 297 Notice of Appeal 311 AMENDED Notice of Appeal by Intervenor Plaintiffs Remcey Jeunenne Peeples, Monika Starke (Attachments: # 1 Second Amended Notice of Appeal, # 2 Appellant's Form A) (Reilly, Matthew) Modified on 12/23/2009 to clarify (bjb). (Entered: 12/23/2009)

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02/09/2010 320 ORDER denying 306 Motion for Costs; granting in part and denying in part 282 Motion for Fees as follows: The EEOC is ordered to pay CRST $4,004,371.65 in attorneys' fees; and The EEOC is ordered to pay CRST $463,071.25 in expenses for a total attorneys' fee award of $4,560,285.11. This figure includes attorneys' fees, expenses and costs taxed in favor of CRST. The Clerk of Court is directed to close this case. **(See order text).** Signed by Chief Judge Linda R Reade on 2/9/10. (ksy) (Entered: 02/09/2010)

02/09/2010 321 JUDGMENT is entered in favor of CRST Van Expedited Inc against

Equal Employment Opportunity Commission in the amount of $4,560,285.11. This figure includes attorneys' fees, expenses and costs taxed in favor of CRST pursuant to 28 U.S.C. Sec. 1920. Signed by Clerk on 2/9/10. (ksy) (Entered: 02/09/2010)

02/17/2010 322 MOTION to Stay *Pending Appeal* by Plaintiff Equal Employment Opportunity Commission (Kamp, Jean) (Entered: 02/17/2010)

02/17/2010 323 Response to Motion re 322 MOTION to Stay *Pending Appeal* filed by CRST Van Expedited Inc. (Visser, Kevin) (Entered: 02/17/2010)

02/18/2010 324 ORDER STAYING EXECUTION OF JUDGMENT - granting 322 Motion to Stay. Execution on the judgment for Attorney Fees is hereby **STAYED** until 60 days after the entry of the judgment or 14 days after the final resolution of all appeals, whichever later occurs. Signed by Magistrate Judge Jon S Scoles on 2/18/2010. (de) (Entered: 02/18/2010)

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03/24/2010	325	NOTICE OF APPEAL re 321 Judgment by Equal Employment Opportunity Commission. (Attachments: # 1 Form A) (Kamp, Jean) Modified on 3/25/2010 to add link (skm). (Entered: 03/24/2010)
03/25/2010	326	NOA Supplement and Transmission of Notice of Appeal to US Court of Appeals re 325 Notice of Appeal. Case Number due by 3/29/2010. (de) (Entered: 03/25/2010)
03/25/2010	327	USCA Case Number 10-1682 for 325 Notice of Appeal filed by Equal Employment Opportunity Commission. (de) (Additional attachment(s) added on 3/25/2010: # 1 Appeal Briefing Schedule Order) (de). Modified on 3/25/2010 - NEF regenerated to show attachment added. (de). (Entered: 03/25/2010)

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09/08/2010	330	NOA Supplement and Transmission of Notice of Appeal to US Court of Appeals re 329 Notice of Appeal. Case Number due by 9/11/2010. (Copy/ NEF to Mr Riches)(pac) (Entered: 09/08/2010)

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02/22/2012	335	**VACATED** OPINION of USCA (certified copy) as to 325 Notice of Appeal filed by Equal Employment Opportunity Commission, 298 Notice of Appeal filed by Equal Employment Opportunity Commission, 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples: We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. (Attachments: # 1 8th Circuit Correspondence, # 2 8th Circuit Correspondence)(ksy) Modified on 5/10/2012 (ksy). (Entered: 02/22/2012)
02/22/2012	336	**VACATED** JUDGMENT of USCA (certified copy) as to 325 Notice of Appeal filed by Equal Employment Opportunity Commission, 298 Notice of Appeal filed by Equal Employment Opportunity Commission, 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples: It is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in part, reversed in part, and remanded to the district court for proceedings consistent with the opinion of this court. (ksy) Modified on 5/10/2012 (ksy). (Entered: 02/22/2012)

Appendix A

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05/10/2012	339	**AMENDED** OPINION of USCA (certified copy) as to 325 Notice of Appeal filed by Equal Employment Opportunity Commission, 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples: We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. (Attachments: # 1 8th Circuit Correspondence, # 2 8th Circuit Correspondence)(ksy) (Entered: 05/10/2012)
05/10/2012	340	**AMENDED** JUDGMENT of USCA (certified copy) as to 325 Notice of Appeal filed by Equal Employment Opportunity Commission, 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples: It is hereby ordered and adjudged that the judgments of the district court in these causes are affirmed in part, reversed in part, and remanded to the district court for proceedings consistent with the opinion of this court. (ksy) (Entered: 05/10/2012)
06/12/2012	341	ORDER of USCA (certified copy) as to 325 Notice of Appeal filed by Equal Employment Opportunity Commission,

and 329 Notice of Appeal filed by Jonathan Lee Riches: The petitions for rehearing en banc are denied. The petitions for panel rehearing are also denied. (ksy) (Entered: 06/12/2012)

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09/17/2012 345 MANDATE of USCA (certified copy) as to 325 Notice of Appeal filed by Equal Employment Opportunity Commission, 297 Notice of Appeal filed by Monika Starke, Remcey Jeunenne Peeples and 298 Notice of Appeal filed by Equal Employment Opportunity Commission: In accordance with the 339 opinion and 340 judgment of 5/8/2012, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matters. (skm) (Entered: 09/17/2012)

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09/19/2012 347 TRIAL Management Order: Witness and exhibit lists exchanged by parties (but not filed) at least 7 calendar days before FPTC. Exhibits marked. Jury Instructions 10 calendar days before FPTC. Motions in limine 7 calendar days before FPTC. Jury Selection set

for 10/16/2012 at 9:00 AM in 4200 C Street SW, Building B, Courtroom 1 before Chief Judge Linda R Reade. Jury Trial set for 10/16/2012 at 8:30 AM in 4200 C Street SW, Building B, Courtroom 1 before Chief Judge Linda R Reade. Final Pretrial Conference set for 10/10/2012 at 10:00 AM in 4200 C Street SW, Building B, Courtroom 1 before Chief Judge Linda R Reade. Proposed Pretrial Order due by 10/5/2012. Signed by Chief Judge Linda R Reade on 9/19/2012. (pac) (Entered: 09/19/2012)

10/03/2012 348 MOTION in Limine by Plaintiff Equal Employment Opportunity Commission (Henry, Ann) (Entered: 10/03/2012)

10/03/2012 349 ORAL ARGUMENT REQUESTED - MOTION in Limine by Defendant CRST Van Expedited Inc (Mathias, John) Modified on 11/19/2012 (ksy). Modified on 11/19/2012 (ksy). (Entered: 10/03/2012)

10/05/2012 350 Proposed Jury Instructions by CRST Van Expedited Inc, Equal Employment Opportunity Commission. (Henry, Ann) (Entered: 10/05/2012)

10/05/2012	351	Proposed Voir Dire by Equal Employment Opportunity Commission. (Henry, Ann) (Entered: 10/05/2012)
10/05/2012	352	Proposed Voir Dire by CRST Van Expedited Inc. (Mathias, John) (Entered: 10/05/2012)
10/05/2012	353	TRIAL BRIEF by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1) (Mathias, John) (Entered: 10/05/2012)

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10/09/2012	356	RESISTANCE to Motion re 349 MOTION in Limine filed by CRST Van Expedited Inc. (ksy) Modified link on 10/10/2012 (ksy). (Entered: 10/09/2012)
10/10/2012	357	MINUTE Entry for proceedings held before Chief Judge Linda R Reade: Motion Hearing re 348 Motion in Limine filed by Equal Employment Opportunity Commission (granted), 349 Motion in Limine filed by CRST Van Expedited, Inc (ruling reserved) held on 10/10/2012. (Court Reporter Patrice Murray) (pac) (Entered: 10/10/2012)

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10/10/2012 359 ORDER: The court orders that the trial currently scheduled to begin on 10/16/2012 is hereby continued. A new trial date will be set by separate order after further consultation with the parties. Signed by Chief Judge Linda R Reade on 10/10/2012. (skm) (Entered: 10/10/2012)

10/11/2012 360 NOTICE by Equal Employment Opportunity Commission *of Withdrawal of Claim on Behalf of Tillie Jones* (Pladson, Nicholas) (Entered: 10/11/2012)

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10/26/2012 363 SUPPLEMENT to 356 Resistance to 349 Motion in Liminie by Equal Employment Opportunity Commission. (Henry, Ann) Modified text on 10/29/2012 (pac). (Entered: 10/26/2012)

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11/12/2012 368 REPLY to Response re 349 Motion in Limine */Supplemental Brief in Support of its Motion in Limine No. 9* filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) (Mathias, John)

Modified on 11/13/2012 (pac). (Entered: 11/12/2012)

11/13/2012	369	MOTION for Leave to File Corrected Supplemental Brief in Support of Its Motion in Limine No. 9 by Defendant CRST Van Expedited Inc (Attachments: # 1 Corrected Supplemental Brief in Support of CRST's Motion in Limine No. 9, # 2 Exhibit 1-To Corrected Supplemental Brief, # 3 Exhibit 2-To Corrected Supplemental Brief, # 4 Exhibit 3-To Corrected Supplemental Brief, # 5 Exhibit 4-To Corrected Supplemental Brief, # 6 Exhibit 5-To Corrected Supplemental Brief) (Mathias, John) (Entered: 11/13/2012)
11/19/2012	370	ORDER granting 369 Motion for Leave to File Corrected Supplemented Brief. The Clerk of Court shall detach and separately docket Defendant's Corrected Supplemental Brief in Support of 349 Motion in Limine and attachments. Signed by Chief Magistrate Judge Jon S Scoles on 11/19/12. (ksy) (Entered: 11/19/2012)
11/19/2012	371	SUPPLEMENTED Brief in supports of 349 MOTION in Limine by CRST Van Expedited Inc (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit

3, # 4 Exhibit 4, # 5 Exhibit 5) (ksy) (Entered: 11/19/2012)

11/20/2012 372 REPLY BRIEF to re 349 ORAL ARGUMENT REQUESTED - MOTION in Limine *EEOC's Reply in Support of Its Supplemental Resistance to CRST's Motion in Limine No. 9* filed by Equal Employment Opportunity Commission. (Henry, Ann) (Entered: 11/20/2012)

12/11/2012 373 NOTICE of Filing of Official Transcript of Pretrial Conference Proceedings held on 10/10/2012, before Chief Judge Linda R Reade. Court Reporter Patrice A Murray, Telephone number (319) 286-2338. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/1/2013. Redacted Transcript Deadline set for 1/11/2013. Release of Transcript Restriction set for 3/11/2013. (pac) (Entered: 12/11/2012)

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01/28/2013	377	ORDER granting in part, denying as moot in part and denied in part 349 Motion in Limine (see text of Order for details). Signed by Chief Judge Linda R Reade on 1/28/2013. (skm) (Entered: 01/28/2013)

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02/08/2013	379	Joint MOTION For Entry Of Order Of Dismissal by Defendant CRST Van Expedited Inc, Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Mathias, John) (Entered: 02/08/2013)
02/11/2013	380	ORDER granting 379 Motion for Entry of Order of Dismissal. The Clerk shall enter Judgment in accordance with this Order *(see order of text)*. Signed by Chief Judge Linda R Reade on 2/8/2013. (pac) (Entered: 02/11/2013)
02/11/2013	381	JUDGMENT is entered in accordance with the attached. Signed by Clerk and approved by Chief Judge Linda R Reade on 2/8/2013. (Attachments: # 1 Order of Dismissal) (pac) Modified text on 2/13/2013 (pac). (Entered: 02/11/2013)

Appendix A

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03/18/2013	384	BILL of Costs by CRST Van Expedited Inc Responses due by 4/15/2013 (Attachments: # 1 Schedule A, # 2 Schedule B) (Mathias, John) Modified on 3/20/2013 to correct response deadline per 383 Order (skm). (Entered: 03/18/2013)

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03/18/2013	386	MOTION for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) by Defendant CRST Van Expedited Inc. (Attachments: # 1 Petition for an Award of Its Reasonable Attorney's Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k), # 2 Attachment A, # 3 Attachment B, # 4 Attachment C.01, # 5 Attachment C.02, # 6 Attachment C.03, # 7 Attachment C.04, # 8 Attachment C.05, # 9 Attachment D, # 10 Attachment E, # 11 Attachment F, # 12 Attachment G, # 13 Attachment H, # 14 Attachment I, # 15 Attachment J, # 16 Attachment K, # 17 Attachment L, # 18 Attachment M.01, # 19 Attachment M.02, # 20 Attachment M.03, # 21 Attachment M.04, # 22 Attachment M.05, # 23

Attachment M.06, # 24 Attachment M.07, # 25 Attachment M.08, # 26 Attachment M.09, # 27 Attachment M.10, # 28 Attachment M.11, # 29 Attachment M.12, # 30 Attachment M.13, # 31 Attachment M.14, # 32 Attachment M.15, # 33 Attachment M.16, # 34 Attachment M.17, # 35 Attachment N, # 36 Attachment O, # 37 Attachment P, # 38 Attachment P.01, # 39 Attachment P.02, # 40 Attachment P.03, # 41 Attachment P.04, # 42 Attachment P.05, # 43 Attachment P.06, # 44 Attachment P.07, # 45 Attachment Q) (Mathias, John) Modified text on 3/19/2013 (pac). (Entered: 03/18/2013)

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04/15/2013 388 RESISTANCE to Motion re 386 MOTION for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) *Resistance to CRST's Bill of Costs* filed by Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit Judgment of 2/11/13) (Kamp, Jean) Modified text on 4/16/2013 (pac). (Entered: 04/15/2013)

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04/16/2013	391	BRIEF in Opposition re 386 MOTION for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) filed by Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (ksy) (Entered: 04/16/2013)

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04/30/2013	394	REPLY BRIEF in Support of 386 MOTION for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (ksy) (Entered: 04/30/2013)
05/06/2013	395	MOTION for Leave to File Sur-Reply *in Support of Its Opposition To CRST's Petition for Reasonable Attorney's Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. 2000e-5(k)* by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Exhibit EEOC's Sur-Reply in Support of its Opposition to CRST Van Expedited, Inc.s Petition for an Award of its Reasonable Attorney's Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. 2000e-5(k)) (Kamp, Jean) (Entered: 05/06/2013)

05/07/2013	396	ORDER granting 395 Motion for Leave to File Sur-Reply *in Support of Its Opposition To CRST's Petition for Reasonable Attorney's Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. 2000e-5(k).* The Clerk of Court shall detach and separately docket EEOC's Surreply attached to the instant motion. Signed by Chief Magistrate Judge Jon S Scoles on 5/7/2013. (skm) (Entered: 05/07/2013)
05/07/2013	397	SUR-REPLY in Support of Its 388 Opposition to 386 Motion for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) by Equal Employment Opportunity Commission (clerk filed pursuant to 396) Order. (skm) (Entered: 05/07/2013)
07/10/2013	398	Joint MOTION for Leave to File Supplemental Authority *regarding CRST's Petition for Award of Reasonable Attorney's Fees and Out-of-Pocket Expenses* by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Exhibit Vance v. Ball State University, #11-566, June 24, 2013) (Kamp, Jean) (Entered: 07/10/2013)

07/10/2013	399	ORDER granting 398 Motion for Leave to File Supplemental Authority regarding CRST's Petition for Award of Reasonable Attorney's Fees and Out-of-Pocket Expenses. Signed by Chief Magistrate Judge Jon S Scoles on 7/10/2013. (JK) (Entered: 07/10/2013)
08/01/2013	400	ORDER: Regarding 384 Bill of Costs by Defendant CRST Van Expedited Inc, costs in the amount of $91,758.46 are taxed in favor of CRST. The 386 Motion for Attorney Fees and Out-of-Pocket Expenses by Defendant CRST Van Expedited Inc, is granted in part and denied in part. The EEOC is ordered to pay CRST $4,189,296.10 in attorneys' fees and $413,387.58 in out-of-pocket expenses. The Clerk of Court is directed to enter judgment in favor of CRST in the amount of $4,694,442.14 and close this case (see text of Order). Signed by Chief Judge Linda R Reade on 8/1/2013. (skm) (Entered: 08/01/2013)
08/01/2013	401	JUDGMENT on Attorney Fees in favor of CRST Van Expedited Inc against Equal Employment Opportunity Commission: Judgment is hereby entered in favor of CRST Van Expedited, Inc., in the amount

of $4,694,442.14 for attorneys' fees, expenses and the costs taxed in favor of CRST Van Expedited, Inc., pursuant to 28 U.S.C. 1920. Signed by Clerk on 8/1/2013. (skm) (Entered: 08/01/2013)

09/27/2013 402 NOTICE of Appeal re 401 Judgment on Attorney Fees by Equal Employment Opportunity Commission. (Kamp, Jean) Modified on 9/30/2013 to add link (pac). (Entered: 09/27/2013)

09/30/2013 403 NOA Supplement and Transmission of Notice of Appeal to US Court of Appeals re 402 Notice of Appeal. Case Number due by 10/4/2013. (ksy) (Entered: 09/30/2013)

10/01/2013 404 USCA Case Number 13-3159 for 402 Notice of Appeal filed by Equal Employment Opportunity Commission. (ksy) (Entered: 10/01/2013)

10/01/2013 405 USCA Scheduling Order as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission. (ksy) (Entered: 10/01/2013)

12/22/2014 406 OPINION of USCA as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission: We reverse the judgment of the district

court and remand for further proceedings consistent with this opinion. (Attachments: # 1 8th Circuit Correspondence)(ksy) (Entered: 12/22/2014)

12/22/2014 407 JUDGMENT of USCA as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission: It is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with 406 Opinion of this court. (ksy) (Entered: 12/22/2014)

02/20/2015 408 ORDER of USCA as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission: The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (ksy) (Entered: 02/20/2015)

02/27/2015 409 MANDATE of USCA as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission. In accordance with 406 Opinion and 407 Judgment of 12/22/2014, the formal mandate is hereby issued in the above-styled matter. (ksy) (Entered: 02/27/2015)

05/19/2015	410	ORDER Setting Briefing Schedule pursuant to 409 USCA Mandate: Defendant's Brief due by 7/18/2015. Plaintiff's Brief due by 8/17/2015. Defendant's reply brief, if any, due by 8/24/2015. **(See Order Text)** Signed by Chief Judge Linda R Reade on 5/19/15. (ksy) (pac). (Entered: 05/19/2015)
05/29/2015	411	WRIT of Certiorari Filed by US Supreme Court MANDATE of USCA (certified copy) as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission, Supreme Court Case No 13-3159 (Attachments: # 1 8th Circuit Memo)(ksy) (Entered: 05/29/2015)
		***
07/02/2015	413	ORDER granting 412 Unresisted Motion for Extension of Time for Filing Motion for Award of Fees and Expenses and for Waiver of Page Limitation for the Supporting Brief (Expedited) filed by CRST Van Expedited Inc. CRST's motion for an award of attorneys' fees and expenses and its supporting brief shall be filed no later than 7/31/2015. EEOC's opposing brief shall be filed no later than 9/14/2015. CRST's reply brief shall be filed no later than 9/28/2015.

The Court waives Local Rule 7(h) 20 page limitation for CRST's brief supporting its motion for an award of attorneys' fees and expenses. Signed by Chief Judge Linda R Reade on 7/2/2015. (skm) (Entered: 07/02/2015)

07/10/2015 414 MOTION for Relief from Judgment Pursuant to Rule 60(b)6 by Plaintiff Equal Employment Opportunity Commission. (Attachments: # 1 Brief In Support of Motion, # 2 Exhibit 1, # 3 Certificate of Service) (Kamp, Jean) Modified text on 7/10/2015 (pac). (Entered: 07/10/2015)

07/27/2015 415 Response to Motion re 414 MOTION for Relief from Judgment Pursuant to Rule 60(b)6 filed by CRST Van Expedited Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Mathias, John) (Entered: 07/27/2015)

07/31/2015 416 DEFENDANTS Brief re 413 Order *Defendant CRST Van Expedited, Inc.'s Brief Supporting its 386 Request for an Award of Attorneys' Fees, Out-Of-Pocket Expenses, and Taxable Costs* by CRST Van Expedited Inc (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6) (Mathias,

John) Modified on 9/29/2015 (skm). (Entered: 07/31/2015)

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08/06/2015	417	REPLY to Response to Motion re 414 MOTION for Relief from Judgment Pursuant to Rule 60(b)6 filed by Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit 1) (Henry, Ann) (Entered: 08/06/2015)
09/11/2015	418	MOTION for Leave to File Supplemental Authority by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Supplement) (Henry, Ann) (Entered: 09/11/2015)

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09/15/2015	420	ORDER granting 418 Motion for Leave to File Supplemental Authority in Support of 414 Motion for Relief from Judgment. The Clerk of Court is directed to detach and separately docket the Supplement (docket no. 418-1). CRST Van Expedited, Inc., may submit a response to the Supplement no later than 9/17/2015. Signed by Chief Judge Linda R Reade on 9/15/2015. (skm) (Entered: 09/15/2015)

09/15/2015 421 SUPPLEMENT to 414 Motion for Relief from Judgment Pursuant to Rule 60(b)6 *Supplemental Authority* by Equal Employment Opportunity Commission (filed pursuant to 420 Order). (skm) (Entered: 09/15/2015)

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09/15/2015 423 PLAINTIFF'S Brief in Resistance to 386 Defendant's Motion for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) filed pursuant to 413 Order by Equal Employment Opportunity Commission. (ksy) (Entered: 09/15/2015)

09/15/2015 424 RESPONSE to 421 SUPPLEMENT re 414 Motion for Relief *Response to Plaintiff EEOC's Submission of Supplemental Authority* by CRST Van Expedited Inc (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Mathias, John) Modified on 9/16/2015 to add link (pac). (Entered: 09/15/2015)

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09/29/2015 428 REPLY BRIEF in Support of 386 MOTION for Attorney Fees and Out-of-Pocket Expenses Pursuant to 42 U.S.C. § 2000e-5(k) filed by CRST Van

		Expedited Inc pursuant to 413 Order. (skm) (Entered: 09/29/2015)
		***
10/09/2015	430	REPLY to 424 Defendant's Response to EEOC's 421 Submission of Supplemental Authority re 414 MOTION filed by Equal Employment Opportunity Commission. (filed pursuant to 429 Order) (jjh) (Entered: 10/09/2015)
11/11/2015	431	MOTION for Leave to File Supplemental Authority in Opposition to Plaintiff's Motion for Relief from Judgment by Defendant CRST Van Expedited Inc (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Mathias, John) (Entered: 11/11/2015)
11/12/2015	432	ORDER granting 431 Motion for Leave to File File Supplemental Authority in Opposition to Plaintiff's 414 Motion for Relief from Judgment. EEOC may file a response no later than 11/16/2015. Signed by Chief Judge Linda R Reade on 11/12/2015. (pac) Modified text on 11/13/2015 (pac). (Entered: 11/12/2015)
		***

11/16/2015	433	MOTION for Leave to File Supplemental Authority In Support of Its Rule 60(B)(6) Motion and Response to CRST's Motion to Submit Supplemental Authority by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Kamp, Jean) (Entered: 11/16/2015)
11/18/2015	434	ORDER: Granting 433 Motion for Leave to File Supplemental Authority. Signed by Chief Judge Linda R Reade on 11/17/15. (kfs) (Entered: 11/18/2015)
11/18/2015	435	MOTION for Leave to File A Response to EEOC's Submission of Supplemental Authority by Defendant CRST Van Expedited Inc (Mathias, John) (Entered: 11/18/2015)
11/19/2015	436	ORDER granting 435 Motion for Leave to File A Response to EEOC's Submission of Supplemental Authority. Signed by Chief Judge Linda R Reade on 11/19/2015. (pac) (Entered: 11/19/2015)
12/10/2015	437	MOTION for Leave to File a Supplemental Brief Concerning the Supreme Court's Order Granting CRST's Petition for Certiorari by

		Defendant CRST Van Expedited Inc (Attachments: # 1 Exhibit 1) (Mathias, John) (Entered: 12/10/2015)
12/10/2015	438	WRIT of Certiorari granted by US Supreme Court as to 402 Notice of Appeal filed by Equal Employment Opportunity Commission. Supreme Court Case No 14-1375. (Attachments: # 1 8th Circuit Correspondence)(ksy) (Entered: 12/10/2015)
12/11/2015	439	ORDER granting 437 Motion for Leave to File a Supplemental Brief Concerning the Supreme Court's 438 Order Granting CRST's Petition for Certiorari. The Clerk of Court is directed to detach and separately file Defendant CRST Van Expedited, Inc.'s Supplemental Brief Concerning the Supreme Court's Order Granting CRST's Petition for Certiorari with Respect to CRST's Request for an Award of Attorney's Fees and Expenses (docket number 437-1) attached to the instant motion. Signed by Chief Magistrate Judge Jon S Scoles on 12/10/2015. (skm) Modified text on 12/10/2015 (skm). (Entered: 12/11/2015)

12/11/2015	440	SUPPLEMENTAL Brief to 416 Brief re 386 Request for an Award of Attorneys' Fees, Out-Of-Pocket Expenses, and Taxable Costs by CRST Van Expedited Inc. *Concerning the 438 Supreme Court's Order Granting Petition for Certiorari* (filed per 439 Order). (Attachments: # 1 Exhibits A-C) (skm) (Entered: 12/11/2015)
12/14/2015	441	ORDER denying 414 Motion for Relief from Judgment Pursuant to Rule 60(b)6. **(See order text).** Signed by Chief Judge Linda R Reade on 12/14/15. (ksy) (Entered: 12/14/2015)
12/15/2015	442	MOTION for Leave to File Response to CRST's *Supplement Brief* by Plaintiff Equal Employment Opportunity Commission (Attachments: # 1 Brief) (Henry, Ann) (Entered: 12/15/2015)
12/16/2015	443	ORDER granting 442 Motion for Leave to File Response to CRST's Supplement Brief. The Clerk of Court is directed to detach and separately file EEOC's Response to CRST's Supplemental Brief. Signed by Chief Magistrate Judge Jon S Scoles on 12/16/2015. (pac) (Entered: 12/16/2015)

12/16/2015	444	RESPONSE to 440 SUPPLEMENTAL Brief re 386 Request for an Award of Attorneys' Fees, Out-Of-Pocket Expenses, and Taxable Costs by Equal Employment Opportunity Commission. (pac) (Entered: 12/16/2015)

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APPENDIX B — EXCERPT OF REPLY BRIEF OF THE EEOC IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 2, 2014

No. 13-3159

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff/Appellant,

v.

CRST VAN EXPEDITED, INC.,

Defendant/Appellee.

On Appeal from the United States District Court
for the Northern District of Iowa
Civil Action No. 07-cv-95-LRR

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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Appendix B

* * *

A. EEOC reasonably believed it satisfied Title VII's pre-suit requirements before filing suit.

Before filing suit seeking relief for Starke and other women, EEOC investigated whether CRST's conduct subjected Starke and other women to a violation of Title VII, found reasonable cause to believe it did, and offered CRST an opportunity to conciliate this class claim. In its opening brief, EEOC argued that it reasonably believed this conduct satisfied Title VII's statutory prerequisites for a lawsuit seeking relief for multiple victims of the same type of Title VII violation.[6] EEOC-Brf at 62-78.

Thus, EEOC has not "conceded that it did not satisfy Title VII's pre-suit requirements for any of the

---

6. Had CRST provided EEOC with the information EEOC requested at the outset of the Starke investigation or had CRST joined EEOC in trying to conciliate the charge in this case, claimants would have been identified during investigation or conciliation and CRST might have made changes to its practices that could have prevented future harassment. *See* EEOC-Brf at 11-14. But because CRST withheld requested information and then rejected the opportunity to identify claimants before suit was filed—declining to conciliate for reasons unrelated to the conciliation process EEOC outlined—identification of claimants came during discovery, as is usually the case when respondents refuse to discuss relief for anyone other than the initial charging party. *See, e.g., EEOC v. Bruno's Rest.*, 13 F.3d at 289 (EEOC reasonably believed its pattern or practice conciliation efforts sufficient where defendant was unwilling to engage in discussion of individual charge).

'claims' dismissed on summary judgment other than those on behalf of" Starke and Peeples, nor has EEOC "admitted that it did *nothing* before filing this lawsuit to investigate, find reasonable cause, and conciliate" with respect to 152 of the 154 women identified in EEOC's lawsuit, as CRST wrongly asserts. E.g. CRST-Brf at 58, 59, 63-64 (internal quotation marks added). CRST bases these supposed concessions on EEOC's alleged failure to address in its opening brief one portion of the district court's fee decision. *See* CRST-Brf at 58-59 (quoting district court's fee award, R.400, at A-319 n.9). The district court reasoned that nothing short of EEOC's individual identification of each alleged victim and EEOC's separate investigation, issuance of reasonable cause determination, and conciliation would have satisfied Title VII's pre-suit requirements in a case like this. See CRST-Brf at 58-59. This was the same rationale on which the district court based its August 2009 dismissal order, A-185-224.

The court's factual statement that EEOC did not conduct separate, individual investigations nor separately conciliate the individual allegations of each alleged victim is correct, but EEOC does not concede that this amounts to a failure to satisfy Title VII's pre-suit requirements. Rather, as EEOC argued below and in its opening brief, based on existing judicial precedent, when EEOC filed this lawsuit, it reasonably believed it had undertaken all of the steps that Title VII requires and was not required to identify every potential victim before filing suit. *See* EEOC-Brf at 62-78.

CRST concedes that "EEOC may properly sue on behalf of the entire class affected by company-wide or workplace discrimination or harassment uncovered in EEOC's investigation without having investigated each individual's claim." *Id.* at 62. CRST states that such lawsuits could properly include a claim that multiple female workers were sexually harassed, where the harassment was either by the same alleged harassers or in a common workplace. CRST-Brf at 61-62 & cases cited in nn.15&16. CRST further concedes that EEOC is not required to identify all of the victims (*i.e.*, claimants) during the administrative process. *Id.* at 62.

CRST nevertheless argues that EEOC had no reasonable grounds to be surprised by the outcome of the first appeal. CRST asserts that this Court did not create a "new legal rule" but simply applied the holding in *EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992), that "an EEOC lawsuit is not confined to the specific allegations in the charge" so long as "the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding." *See* CRST-Brf at 60 (citing A-275, which quotes *Delight Wholesale*, 973 F.3d at 668).

What CRST fails to explain is how the line of cases CRST noted in its brief (at 61 & nn. 15 & 16), or the facts of this case, should have alerted EEOC that the standard rule—that EEOC is permitted to seek relief for a class without first investigating each individual's separate allegations, CRST-Brf at 62—would not apply here. CRST notes the district court's observation that

CRST's workplaces "are largely the cabs of hundreds of semi-truck tractors." CRST-Brf at 62 (citing A-66). But until this Court issued its divided ruling in the first appeal, there was no authority suggesting that the isolated location of harassment incidents compels different EEOC administrative requirements.

CRST argues that its non-unified workplace—the separate cabs of individual trucks—means that the harassment allegation of one female driver "provides no basis for concluding that CRST violated Title VII with respect to other female drivers allegedly harassed by other male drivers on other trucks at different times and places." CRST-Brf at 62-63. But a claim that *CRST* violated Title VII is not based on what a male harasser did. Liability for workplace harassment is based on an *employer's* failure to take the steps required by Title VII to prevent and remedy harassment. *Cf. EEOC v. Dial Corp.*, 156 F. Supp. 2d at 946-47 (company practice of tolerating sexual harassment forms basis for pattern or practice liability).

EEOC's lawsuit addressed whether CRST's preventive and remedial responses to the complaints of female drivers were adequate, and EEOC reasonably believed the existing rule concerning lawsuits seeking class relief, *see* CRST-Brf at 61 & nn. 15 & 16, applied to its pre-suit efforts. CRST offers no explanation of why this belief was unreasonable.

* * * *

APPENDIX C — EXCERPT OF OPENING BRIEF OF THE EEOC IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JANUARY 17, 2014

No. 13-3159

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff/Appellant,

v.

CRST VAN EXPEDITED, INC.,

Defendant/Appellee.

On Appeal from the United States District Court for the Northern District of Iowa

CORRECTED BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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Appendix C

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* * *

B. The court's ruling that EEOC failed to satisfy Title VII's presuit requirements was not a ruling on the merits and, therefore, CRST is not a prevailing party with respect to that ruling.

The district court also erred as a matter of law in awarding fees because the ruling on which CRST primarily prevailed and which was the sole basis on which the district court initially awarded fees to CRST—that the EEOC failed to satisfy Title VII's presuit requirements—does not go to the merits of EEOC's Title VII claim against CRST. Rather, it is a procedural ruling that does not address, at all, the substance of EEOC's claim that CRST failed to prevent and remedy workplace sexual harassment. Such a ruling does not constitute the type of merits-related decision that this Court held, in *Marquart*, is necessary to warrant according a Title VII defendant the status of "prevailing party."

In *Marquart*, this Court explained that a defendant is not a "prevailing" party for purposes of Title VII's fee-shifting provision unless two conditions are met: a judicial determination on the merits of the plaintiff's case and, in

addition, a judicial determination that the plaintiff's case was frivolous, unreasonable, or groundless. *Marquart*, 26 F.3d at 851-52. Absent these two conditions, a Title VII defendant is not a "prevailing party" for purposes of awarding fees, even if the defendant has succeeded in bringing the plaintiff's lawsuit to an end.

No such ruling on the merits occurred here with respect to Monika Starke or the 67 women for whom, the district court ruled, the EEOC presented actionable claims of a Title VII violation. To the contrary, CRST failed to move for summary judgment with respect to 32 women, and the district court *rejected* CRST's merits-based motions with respect to another 35 women. Further, this Court rejected CRST's merits-based contentions with respect to Jones.

The only reason the court dismissed EEOC's lawsuit after finding that EEOC alleged actionable harassment with respect to 67 women was the court's conclusion that EEOC had failed to undertake certain administrative steps that Title VII requires before EEOC can file suit. The court mistakenly concluded that demonstrating satisfaction of Title VII's presuit conditions is an "ingredient" of EEOC's Title VII claim. Analogizing to a Supreme Court decision addressing Title VII's requirement that an employer have a minimum of fifteen employees to be covered by the Act, the court concluded that its ruling that EEOC failed to satisfy Title VII's presuit requirements fell within *Marquart*'s requirement of a ruling on the merits. *See* R.400 at 20 (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (Title VII's employee-

numerosity requirement "is an element of a plaintiff's claim for relief, not a jurisdictional issue")).

The district court erred. *Arbaugh* is inapposite, because Title VII's presuit conditions are very different from Title VII's employee-numerosity provision. The latter distinguishes employers who are subject to Title VII's prohibitions from those who are not. In other words, if an employer does not meet the statute's numerosity requirements, there is no possible claim because such an employer cannot violate Title VII. Consequently, whether an employer has sufficient employees to be covered under Title VII is properly viewed as an element of a plaintiff's claim for relief, regardless of whether the plaintiff is the EEOC or a private employee.

Whether a plaintiff has satisfied Title VII's presuit requirements, on the other hand, presents a very different question. A plaintiff (either a private plaintiff or the EEOC) asserting a claim of sexual harassment under Title VII must demonstrate that the employer is covered under the Act and the factual elements of the claim. A private plaintiff can file suit under Title VII only if she filed a timely charge with EEOC alleging sexual harassment and then filed her lawsuit within 90 days of receiving an EEOC right-to-sue notice. *See* 42 U.S.C. § 2000e-5(b), (e)(1), (f)(1); *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 740 n.3 (8th Cir. 1996) (*per curiam*). Satisfaction of those statutory presuit requirements is not, however, an element of the plaintiff's discrimination claim. *See Rester v. Stephens Media, LLC*, --- F.3d ---, 2014 WL 103968, at *2 n.2 (8th Cir. Jan. 13, 2014) (distinguishing between

merits of a claim and satisfaction of Title VII presuit requirements); *McSherry*, 81 F.3d at 740-41 (plaintiff's claim under Americans with Disabilities Act (ADA), which incorporates Title VII's procedural requirements, accrued upon plaintiff's termination by employer even though plaintiff had not yet received his EEOC right-to-sue notice).

As this Court explained in *McSherry*, although the EEOC right-to-sue letter is a statutory prerequisite to suit, it does not "create a claim." Rather, an employee's receipt of a right-to-sue notice is merely a step that must occur before the employee can pursue the claim in court. *Id.* at 740-41; *see also Sanchez v. Northwest Airlines, Inc.*, 659 F.3d 671, 675 (8th Cir. 2011) (plaintiff's ADA claim accrued when employer rescinded plaintiff's promotion, not when EEOC issued right-to-sue notice); *Holcombe v. U.S. Airways, Inc.*, 369 Fed. App'x 424, 428 (4th Cir. 2010) (EEOC right-to-sue notice is "a procedural requirement" that "does not give rise to the [plaintiff's] ADA claim).[13]

Likewise, Title VII requires EEOC to issue a reasonable cause finding and attempt conciliation before filing *any* lawsuit—not just one claiming sexual harassment. *See* 42 U.S.C. § 2000e-5(b), (f)(1). Nevertheless, although these administrative steps are a presuit requirement, they are not "elements" of an EEOC

13. In *McSherry*, this Court mistakenly referred to Title VII presuit requirements as "jurisdictional." *See* 81 F.3d at 741. This Court, however, has clarified that Title VII's statutory presuit requirements are *not* jurisdictional in nature. *See Rester*, 2014 WL 103968, at *2 n.2.

claim of sexual harassment or of any other Title VII violation. They do not distinguish which employers are subject to Title VII, nor whether an employer has violated Title VII, but only whether the case has undergone the type of pre-litigation process that Congress intended before EEOC is free to file a lawsuit, *i.e.*, a process that gives employers an opportunity to resolve a dispute short of litigation.

Indeed, the procedural steps Title VII imposes may be accomplished in ways that can differ markedly from case to case. *See EEOC v. Mach Mining, LLC*, --- F.3d ---, 2013 WL 6698515, at *4 n.2 (7th Cir. Dec. 20, 2013). They are also largely (and properly) shielded from judicial review. *See EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (no judicial review of EEOC reasonable cause determination); *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 834-35 (D.C. Cir. 2001) (same); *Georator Corp. v. EEOC*, 592 F.2d 765, 767-69 (4th Cir. 1979) (same); *Mach Mining*, 2013 WL 6698515, at *3-12 (holding Title VII contains no affirmative defense for failure to conciliate based, in part, on express statutory language making clear that conciliation is an informal process entrusted to the EEOC's discretion which is not amenable to judicial review).

The distinction in the Federal Rules of Civil Procedure between what is required in a complaint with respect to the elements of a claim and the conditions precedent for bringing that claim further supports the conclusion that satisfying conditions precedent is not an "ingredient" of a claim. Under Rule 8, a plaintiff's complaint must include

"a short and plain statement *of the claim* showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint must contain sufficient factual content to permit reasonable inference that defendant is liable for misconduct alleged).

Conditions precedent—such as Title VII's administrative prerequisites to suit—are not included in this requirement, however. Instead, under Rule 9, "it suffices to allege generally that all conditions precedent have occurred or been performed." Fed. R. Civ. P. 9(c); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 106-07 (5th Cir. 1981) (per curiam). Only if the defendant's answer denies "with particularity" that a condition precedent occurred or has been performed is a plaintiff required to offer details to demonstrate the condition was satisfied. Fed. R. Civ. P. 9(c). This statement of separate pleading standards for claims versus conditions precedent reinforces the conclusion that establishing that EEOC satisfied its statutory presuit requirements is not an "ingredient" of EEOC's Title VII claim against CRST.

This conclusion is reinforced by the fact that many courts, upon finding that EEOC failed to satisfy one or more of Title VII's presuit steps, have stayed the case to allow the Commission to complete the step. *See, e.g., EEOC v. Evans Fruit Co., Inc.*, 872 F. Supp. 2d 1107, 1116-17 (E.D. Wash. 2012); *EEOC v. Crye-Leike, Inc.*, 800 F. Supp. 2d 1009 (E.D. Ark. 2011); *EEOC v. McGee Bros. Co.*, 2011 WL 1542148, at *7 (W.D.N.C. Apr. 21, 2011); *EEOC v. Die Fliedermaus*, 77 F. Supp. 2d 460, 467-68 (S.D.N.Y. 1999).

As the Seventh Circuit recently noted, this is really the only appropriate remedy when a defendant complains of insufficient process; a stay to permit further conciliation cures the alleged deficiency, and there is "no sound basis for dismissing a case on the merits." *Mach Mining*, 2013 WL 6698515, at *12.

Even courts that have dismissed an EEOC's lawsuit rather than stay the case to permit further conciliation have ordinarily dismissed "without prejudice." *See, e.g., EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1044 (D. Ariz. 2013) (dismissing without prejudice twenty-one claimants not identified until after EEOC filed suit); *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1247, 1253, 1254-58 (M.D. Ala. 1980).

The "primary meaning of 'dismissal without prejudice' . . . is dismissal without barring plaintiff from returning later, to the same court, with the same underlying claim." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001). Thus, dismissal without prejudice permits the EEOC, if it chooses, to complete the missing procedural step(s) and re-file suit, a point at least one court expressly noted. *See, e.g., EEOC v. Sears, Roebuck & Co.*, Civ. No. 79-cv-5708, 1980 WL 180, at *1-2 (S.D.N.Y. June 16, 1980) ("The EEOC will not be stymied by a dismissal of this action without prejudice. The commission can institute this action again providing it does so properly."). In contrast, if the EEOC (or any plaintiff) fails to establish an element of its claim, the case is properly dismissed with prejudice. *See, e.g., Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 945-46 (8th Cir. 1994) (affirming summary

judgment because, although plaintiff's evidence sufficed on other elements of his discrimination claim, he failed to offer sufficient evidence of pretext).

As all of these authorities indicate, EEOC's administrative presuit steps are not an "ingredient" of a Title VII claim. Therefore, the district court's dismissal here on the ground that EEOC failed to complete presuit administrative steps for individuals other than Starke was not a ruling on the merits of EEOC's underlying Title VII claim. If not for this non-merits ruling, EEOC would have proceeded to trial on its claim that CRST failed to prevent and/or remedy effectively the sexual harassment experienced by 69 women. Under *Marquart*, CRST is not the "prevailing defendant" under these circumstances. The district court erred in concluding that "dismissal of claims due to the EEOC's failure to satisfy its presuit obligations is a dismissal on the merits of the EEOC's claims." A-314.

II. CRST is Not Entitled to Fees Because EEOC's Lawsuit Was Not Frivolous, Unreasonable, or Without Foundation.

Even if CRST is deemed a prevailing party here, it is not entitled to fees because EEOC's lawsuit was not "frivolous, unreasonable, or without foundation" as required for a fee award to a prevailing defendant.

* * *

First, although EEOC did not prevail in its argument that this was a pattern-or-practice case, EEOC's position was not frivolous or unreasonable.[18] Second, even if EEOC's position were frivolous or unreasonable, CRST would have incurred these defense fees anyway.

The court's only explanation for imposing fees on EEOC based on the pattern-or-practice issue was its reference to its April 30, 2009, Order (A-1) rejecting EEOC's pattern-or-practice argument. *See* A-318 (citing pages 57-67 of R.197). That decision explains the court's ruling on the merits of CRST's motion for summary judgment on EEOC's pattern-or-practice "claim," but it does not address, at all, whether EEOC's attempt to pursue the case under a pattern-or-practice framework was "frivolous, unreasonable, or without foundation" under *Christiansburg*. The court's reliance on its prior order, without more, strongly suggests it imposed fees

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18. EEOC's one-count complaint does not include a "pattern-or-practice claim." *See* I-Apx.40. During discovery, EEOC advised the court and CRST that this was a pattern-or-practice case that EEOC proposed to litigate using the proof paradigm and bifurcated trial model of *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). *See, e.g.*, I-Apx.66 (transcript of 11/12/2008 motion hearing) at I-Apx.72, 74. The court denied EEOC's motion for a bifurcated trial, stating EEOC had waited too long to seek this change in trial proceedings.,III-Apx.770. The court thereafter granted CRST's motion for summary judgment and ruled that EEOC could not use the burden-shifting framework at trial. A-1 (4/30/2009). Among other things, the court reasoned that the proportion of women complaining of sexual harassment was insufficient to demonstrate that tolerating harassment was CRST's regular course of business. A-57-63.

on the EEOC on the ground that because EEOC lost, the claim must have been unreasonable—the very *post hoc* reasoning that the Supreme Court condemned in *Christiansburg*. *See Christiansburg*, 434 U.S. at 421-22; *Marquart*, 26 F.3d at 849.

More importantly, the fact that it took the court sixty-seven pages to explain why it was rejecting EEOC's request to use a pattern-or-practice method of proof is probably the strongest evidence that EEOC's argument was not frivolous. This Court has held that a court should not award fees to a Title VII defendant if there was "some basis" to support the plaintiff's claim, even though that evidence was ultimately unavailing.

* * * *

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WITH INCORPORATED ORDER OF DISMISSAL, FILED FEBRUARY 11, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. 1:07-cv-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

JUDGMENT

DECISION BY COURT. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Order (doc. 380) filed on February 11, 2013:

Judgment is entered in accordance with the attached.

Appendix D

Approved as to form by

/s/_____
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Dated February 11, 2013

ROBERT L. PHELPS
CLERK

/s/_____

Deputy Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-0095-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

CRST VAN EXPEDITED, INC.,

Defendant.

ORDER OF DISMISSAL

Plaintiff Equal Employment Opportunity Commission ("EEOC") and defendant CRST Van Expedited, Inc. ("CRST") having filed a Joint Motion To Dismiss;

This Court having originally entered Judgment in this case on October 1, 2009, in favor of CRST;

That Judgment having been affirmed in part and reversed in part on May 8, 2012, by the Eighth Circuit Court of Appeals, with rehearing and rehearing *en banc* denied on June 8, 2012;

Appendix D

The Court of Appeals in its May 8, 2012 decision having vacated, without prejudice, this Court's February 9, 2010 award of attorney's fees and costs to CRST;

The Court of Appeals also having remanded EEOC's claims on behalf of Tillie Jones and Monika Starke for trial;

The Eighth Circuit's mandate having issued on September 14, 2012;

EEOC having withdrawn its claim on behalf of Tillie Jones on October 11, 2012, on the ground that it was barred by this Court's Order of August 13, 2009 [ECF Docket No. 263]; and

The parties having entered into an agreement settling EEOC's claim on behalf of Monika Starke pursuant to the terms set forth in the Settlement Agreement attached as Exhibit 1 to the Joint Motion To Dismiss and also attached to this Order as Exhibit 1 and incorporated by reference herein,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Based on EEOC's withdrawal of its claim on behalf of Tillie Jones, the parties' settlement of EEOC's claim on behalf of Monika Starke, and the mandate issued by the Court of Appeals on September 14, 2012, with respect to all other claims asserted by EEOC, this case is DISMISSED WITH PREJUDICE.

2. This Order is entered without prejudice to CRST's motion for an award of attorney's fees and costs, as set forth in Exhibit 1 to this Order.

3. CRST shall file its bill of costs and its motion for an award of attorney's fees and costs, along with a brief and supporting documents, twenty-eight (28) days after the entry of this Order; EEOC shall have twenty-eight (28) days thereafter to file an opposing brief and documents supporting its opposition; and CRST shall have fourteen (14) days thereafter to file a reply brief.

4. The Clerk shall enter Judgment in accordance with this Order.

/s/_____
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Dated: 2/8, 2013

Appendix D

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and between Equal Employment Opportunity Commission ("EEOC") and CRST Van Expedited, Inc. ("CRST") (together referred to as the "Parties").

WHEREAS, EEOC brought a lawsuit against CRST in the United States District Court for the Northern District of Iowa, Cedar Rapids Division, entitled *Equal Employment Opportunity Commission v. CRST Van Expedited, Inc.*, Case No. 1:07-cv-0095-LRR, in which it sought injunctive relief as well as monetary damages;

WHEREAS, the District Court dismissed all claims and entered judgment for CRST on October 1, 2009, and thereafter awarded attorney's fees and costs to CRST in a judgment entered on February 9, 2010;

WHEREAS, on EEOC's appeal of those judgments, on May 8, 2012, the United States Court of Appeals for the Eighth Circuit affirmed except for EEOC's claims on behalf of Monika Starke and Tillie Jones, which were remanded to the District Court for further proceedings, and vacated the award of attorney's fees and costs without prejudice;

WHEREAS, on remand, on October 11, 2012, EEOC withdrew its claim on behalf of Tillie Jones on the ground that it was barred by this Court's Order of August 13, 2009 [ECF Docket No. 263];

Appendix D

WHEREAS, the Parties now wish to settle EEOC's claim on behalf of Ms. Starke;

NOW, THEREFORE, for the mutual consideration stated herein, the Parties agree as follows:

1. CRST shall pay $50,000 (Fifty-Thousand Dollars) in settlement of EEOC's claim on behalf of Ms. Starke. Within thirty (30) days of execution of this Agreement, CRST shall send a check in that amount by certified mail as reasonably directed by EEOC.

2. Within five (5) business days of execution of this Agreement, the Parties shall file a joint motion, in the form attached as Exhibit A hereto, to dismiss EEOC's claim on behalf of Ms. Starke with prejudice. A copy of this Agreement shall be filed as Exhibit 1 to the joint motion to dismiss and attached as Exhibit 1 to the order of dismissal.

3. This Agreement is a compromise resolution of disputed claims and defenses. By entering into this Agreement, neither EEOC nor CRST admits the claims or defenses of the other.

4. This Agreement does not preclude CRST from pursuing attorney's fees and costs pursuant to the Order of the Eighth Circuit dated May 8, 2012.

5. Further, this Agreement does not preclude either EEOC or CRST from making any arguments relating to CRST's pursuit of attorney's fees and costs, including

arguments relating to whether EEOC or CRST is the prevailing party.

6. This Agreement constitutes the entire agreement between the Parties with respect to the matters addressed herein and supersedes all prior oral and written agreements with respect to those matters.

7. This Agreement shall not be modified except by a writing signed by both Parties.

IN WITNESS THEREOF, the Parties have executed this Agreement as of the dates indicated below.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By: /s/_____
Its Attorney
Dated: February 8, 2013

CRST VAN EXPEDITED, INC.

By: /s/_____
Its President/CEO
Dated: February 8, 2013

APPENDIX E — FIRST ATTORNEY'S FEES ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED FEBRUARY 9, 2010

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA,
CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARKE, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Intervenors,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

February 9, 2010, Decided
February 9, 2010, Filed

Appendix E

JUDGES: LINDA R. READE, CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

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I. INTRODUCTION

The matters before the court are the "Motion for Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 2000e-5(k)" ("Fees Motion") (docket no. 282) and the "Motion for Review of the Clerk's Taxation of Costs" ("Costs Motion") (docket no. 306) filed by Defendant CRST Van Expedited, Inc. ("CRST").

II. RELEVANT PRIOR PROCEEDINGS

A. Underlying Action

The Equal Employment Opportunity Commission ("EEOC") brought this case in its own name pursuant to Section 706, 42 U.S.C. § 2000e-5, of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The EEOC filed suit on behalf of approximately 270 allegedly aggrieved women that it contended CRST subjected to sex discrimination in violation of Title VII. Ultimately, the EEOC made approximately 150 of the

270 allegedly aggrieved women available for deposition. Because the EEOC did not make the remaining women available to CRST for deposition, the court held that the EEOC could not seek relief for them.

In its complaint, the EEOC pled a violation of § 706. The EEOC did not plead a violation of § 707--the traditional vehicle used to assert a "pattern or practice" claim. As this case progressed, however, it became clear that the EEOC was asserting a "pattern or practice claim" against CRST. On April 30, 2009, the court entered an Order ("Pattern or Practice Order") (docket no. 197) in which it assumed that either: "(1) § 706 permit[ted] the EEOC to pursue a pattern or practice claim . . . or (2) the EEOC ha[d] constructively amended its complaint to assert a § 707 claim against CRST in this lawsuit in addition to its § 706 claim." Pattern or Practice Order at 26. With this assumption in mind, the court dismissed the EEOC's purported pattern or practice claim against CRST. *See* Pattern or Practice Order at 67 ("To the extent that the EEOC asserts a 'pattern or practice claim' in this litigation against CRST, such claim is DISMISSED WITH PREJUDICE.").

In rulings on a series of summary judgment motions, the court considered the merits of most of the approximately 150 allegedly aggrieved persons' allegations. Ultimately, the court held that CRST could not be held liable for the allegations of the majority of these women and barred the EEOC from seeking relief on their behalf at trial. *See* Orders at docket nos. 197, 223, 225, 251, 256 and 258. The court's disposition of these

summary judgment motions left 67 allegedly aggrieved persons remaining in the EEOC's action.

On August 13, 2009, the court entered an Order ("Order on Motion to Show Cause") (docket no. 263) in which it dismissed the EEOC's Complaint because "the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case." Order on Motion to Show Cause at 31. Specifically, the court found that "the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint--let alone issue a reasonable cause determination as to those allegations or conciliate them." *Id.* (emphasis in original). The court concluded that "[t]he EEOC's failure to investigate the claims of the 67 allegedly aggrieved persons deprived CRST of a meaningful opportunity to engage in conciliation and foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit." *Id.* at 36. Consequently, the court barred the EEOC from seeking relief on behalf of the 67 allegedly aggrieved persons. In the Order, the court noted that CRST was a "prevailing party" and stated that "CRST may file an application for attorneys' fees from the EEOC[.]" *Id.* at 40. On October 1, 2009, the Clerk of Court entered Judgment (docket no. 279) in favor of CRST.

B. Fees and Costs

On October 16, 2009, CRST filed a Bill of Costs (docket no. 280). In its Bill of Costs, CRST sought $ 355,142.22

in costs incurred in this lawsuit. This amount included fees of the Clerk of Court, court reporter fees, witness fees and exemplification and copy fees. On October 30, 2009, CRST filed the Fees Motion. In the Fees Motion, CRST requested $ 7,633,397.77 in attorneys' fees and $ 569,564.64 in expenses that are not recoverable as "costs" under 28 U.S.C. § 1920.

On November 4, 2009, the EEOC filed a "Resistance to Defendant CRST's Bill of Costs" ("Bill of Costs Resistance") (docket no. 286).[1] On November 13, 2009, CRST filed a "Reply to EEOC's Resistance to Defendant CRST's Bill of Costs" ("Bill of Costs Reply") (docket no. 294).

On November 16, 2009, the EEOC filed a Resistance to the Fees Motion ("Fees Resistance") (docket no. 295). On November 30, 2009, CRST filed a Reply in support of the Fees Motion ("Fees Reply") (docket no. 300). In the Fees Reply, CRST also slightly reduced the amount it seeks in attorneys' fees from $ 7,633,397.77 to $ 7,624,546.47.

On December 1, 2009, the Clerk of Court ("Clerk") entered a "Taxation of Costs" (docket no. 303). The Clerk taxed costs in CRST's favor in the amount of $ 92,842.21. The Clerk denied $ 262,300.01 of CRST's claimed costs.

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1. The EEOC originally filed a Resistance to CRST's Bill of Costs on November 2, 2009 (docket no. 285). However, at the request of CRST's counsel, the EEOC filed an amended version to make a minor clarification.

On December 8, 2009, CRST filed the Costs Motion. In the Costs Motion, CRST seeks $ 70,855.52 in costs for videotaping depositions, which the Clerk denied in the Taxation of Costs. On December 14, 2009, the EEOC filed a Resistance to the Costs Motion ("Costs Resistance") (docket no. 310). On December 18, 2009, CRST filed a Reply in support of the Costs Motion ("Costs Reply") (docket no. 312).

On December 22, 2009, CRST filed a "Supplemental Statement in Support of its Motion for Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 2000e-5(k)" ("Fees Supplement") (docket no. 315). In the Fees Supplement, CRST seeks to recover as part of its attorneys' fee award the remainder of its claimed expenses that the Clerk denied in the Taxation of Costs, in the amount of $ 176,444.79. CRST also seeks to recover $ 70,855.52 for videotaping depositions as part of the fee award, if the court declines to award this amount as a cost pursuant to the Costs Motion. In sum, CRST seeks $ 7,624,546.47 in attorneys' fees and $ 816,864.95 in expenses.

III. SUBJECT MATTER JURISDICTION

On November 30, 2009, the EEOC filed a Notice of Appeal ("Notice") (docket no. 298). The Notice "divests [the court] of jurisdiction over aspects of the case that are the subject of the appeal." *United States v. Queen*, 433 F.3d 1076, 1077 (8th Cir. 2007) (per curiam). The amount of attorneys' fees and costs to award Plaintiffs is not a subject of the Notice. Accordingly, the court finds it has subject matter jurisdiction over the Motions. *See, e.g., Lorenz v.*

Valley Forge Ins. Co., 23 F.3d 1259, 1260-61 (7th Cir. 1994) (Easterbrook, J.) ("[C]osts are appealable separately from the merits; a district court may award costs even while the substantive appeal is pending."); *Rothenberg v. Sec. Mgmt. Co.*, 677 F.2d 64, 64 (11th Cir. 1982) (same).

IV. COSTS

On October 16, 2009, CRST filed a Bill of Costs in which it sought $ 355,142.22 in costs. On December 1, 2009, the Clerk taxed costs against the EEOC and in favor of CRST's in the total amount of $ 92,842.21. The Clerk refused to tax costs in CRST's favor for its attorneys' pro hac vice fees, the costs related to videotaped depositions and fees for printing and/or copying.

A. Legal Background

In deciding an issue relating to costs, the court must consult both Federal Rule of Civil Procedure 54(d), which gives the court the power to tax "costs" to a prevailing party and 28 U.S.C. § 1920, which defines "costs." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987). Federal Rule of Civil Procedure 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). "Rule 54 represents a codification of the presumption that the prevailing party is entitled to costs." *Martin v. Daimler Chrysler Corp.*, 251 F.3d 691, 696 (8th Cir. 2001) (quotations omitted); *see also Ex parte Peterson*, 253 U.S.

300, 315-17, 40 S. Ct. 543, 64 L. Ed. 919 (1920) (discussing common law of costs). In other words, "[t]he losing party bears the burden of overcoming the presumption that the prevailing party is entitled to costs[.]" *168th & Dodge, L.P. v. Rave Reviews Cinemas, L.L.C.*, 501 F.3d 945, 958 (8th Cir. 2007). Despite the presumption, exactly which costs will be awarded is a matter left to the discretion of the district court. *Poe v. John Deere Co.*, 695 F.2d 1103, 1108-09 (8th Cir. 1982). However, "the district court must provide a rationale for denying the prevailing party's claim for costs." *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 517 (8th Cir. 2006).

Title 28, United States Code, Section 1920 expressly identifies the expenses a court may tax as costs against a losing party. *Crawford Fitting*, 482 U.S. at 440. In relevant part, the statute provides:

> A judge . . . of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials

> where the copies are necessarily obtained for use in the case;
>
> (5) Docket fees under [§] 1923 of this title;
>
> (6) Compensation of court appointed experts[.]

28 U.S.C. § 1920. "[T]he Supreme Court has held that '*absent explicit statutory* or contractual *authorization* for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.'" *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003) (quoting *Crawford Fitting*, 482 U.S. at 445) (emphasis in *Neosho*).

B. Analysis

In the Costs Motion, CRST asks the court to review only the Clerk's decision to deny CRST "$ 70,855.52 in costs for videotaped depositions necessarily obtained for use in this litigation."[2] CRST Brief in Support of Costs Motion ("Costs Motion Brief") (docket no. 306-1), at 1. The EEOC resists the Costs Motion in its entirety and asks the court to "affirm the Order of the Clerk of Court." Costs Resistance at 1. All of the depositions taken by CRST in this case were videotaped and stenographically transcribed. The Clerk taxed costs for reporting services

2. As previously noted, CRST seeks the remainder of the unawarded costs as expenses in the Fees Motion.

and transcripts but concluded, in part based on this court's decision in *Rakes v. Life Investors Ins. Co. of Am.*, No. 06-CV-99-LRR, 2008 U.S. Dist. LEXIS 91231, 2008 WL 4852932 (N.D. Iowa Nov. 7, 2008) (Reade, C.J.) *abrogated in part on other grounds by Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894 (8th Cir. 2009), that the costs associated with the videotaping of depositions were "not allowed as ordinary expenses." Taxation of Costs at 2.

The EEOC argues that a "prevailing party may claim costs for stenographic deposition transcripts or videotaped depositions, but not both." Costs Resistance at 3. The EEOC also asserts that the videotaped depositions were not "necessary to preserve the testimony of unavailable witnesses or for any reason other than the preference of [CRST's] counsel." *Id.* at 4. CRST argues that costs for both stenographic transcripts and videotapes of the depositions are recoverable under 28 U.S.C. § 1920. CRST also contends that the videotaped depositions were necessary in this case.

The court shall first consider whether, under the facts of this case, costs are recoverable for both stenographic transcripts and videotaped depositions. Then, the court shall consider whether videotaped depositions were necessarily obtained for use in this case.

1. Stenographic vs. videotaped depositions

In *Rakes*, this court allowed costs for stenographic deposition transcripts but declined to allow costs for video recording the same depositions. 2008 U.S. Dist. LEXIS

91231, 2008 WL 4852932, at *7. In doing so, this court noted that the depositions were taken in "phase I of the discovery process where the issue was class certification and not the merits of the cause of action and thus the court [was] not convinced [the] depositions would have had use at trial." *Id.* The court concluded that the "video record duplicates the stenographic record and it would not be fair to tax the costs for both, especially because there [was] no showing that any of the witnesses deposed were likely unavailable for hearing/trial or that videotaping the witnesses was the most economical way for the witness to testify." *Id.*

Subsequent to *Rakes*, the Eighth Circuit Court of Appeals held that "video depositions are included [as taxable costs] under § 1920." *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894, 898 (8th Cir. 2009). In *Craftsmen*, the Eighth Circuit Court of Appeals noted that § 1920 did not "specifically authorize video-deposition costs," but reasoned that such costs are taxable because the Federal Rules of Civil Procedure "authorize[] video depositions as an alternative to traditional stenographic depositions, which § 1920 does authorize." *Id.* at 897. However, *Craftsmen* did not address the issue presented here, that is, whether costs may be taxed for *both* stenographic and video depositions.

Complicating matters further, Congress amended the language of § 1920(2) in 2008. In both *Rakes* and *Craftsmen*, the prior version of the statute was at issue, which provided that the court may tax as costs the "[f]ees of the court reporter for all or any part of the stenographic

transcript necessarily obtained for use in the case[.]" 28 U.S.C. § 1920(2) (1978). The current version, in contrast, specifically refers to video transcripts and states that the court may tax as costs the "[f]ees for *printed or electronically recorded transcripts* necessarily obtained for use in the case[.]" 28 U.S.C. § 1920(2) (emphasis added).

The EEOC argues that the "plain language" of the amended § 1920(2) provides that CRST cannot recover costs for both video transcripts and stenographic transcripts because the statute describes the recoverable item as "printed *or* electronically recorded transcripts[.]" *Id.* In response, CRST relies on *Craftsmen* for the general proposition that video recording fees are recoverable costs.[3] CRST argues that § 1920, as amended, does not

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3. CRST also notes that, in reaching its decision in *Craftsmen*, the Eighth Circuit Court of Appeals cited decisions of three Circuit Courts of Appeals that permitted recovery for both stenographic transcripts and video costs. *See Little v. Mitsubishi Motors N. Am., Inc.*, 514 F.3d 699, 701-02 (7th Cir. 2008) (allowing costs for both transcription and videotaping of same depositions); *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1478 (10th Cir. 1997) (holding that district court did not abuse its discretion in taxing costs of both transcription and videotaping of seven depositions); *see also Morrison v. Reichhold Chems.*, 97 F.3d 460, 464-65 (11th Cir. 1996) (holding that "when a party notices a deposition to be recorded by nonstenographic means, or by both stenographic and nonstenographic means, and no objection is raised at that time by the other party . . . it is appropriate under § 1920 to award the cost of conducting the deposition in the manner noticed"). The current version of § 1920 was not before the Courts of Appeals in these decisions and the issue presented here was not before the Eighth Circuit Court of Appeals in *Craftsmen*.

preclude recovery for both costs, and asserts that the following district court decisions support an award of both costs: *Avante Int'l Tech. Corp. v. Premier Election Solutions, Inc.*, No. 4:06cv0978 TCM, 2009 U.S. Dist. LEXIS 93522, 2009 WL 3259613, at *3 (E.D. Mo. Oct. 7, 2009) (allowing costs for both transcripts and video depositions); *Advanced Software Design Corp. v. Fiserv, Inc.*, No. 4:07CV185 CDP, 2009 U.S. Dist. LEXIS 99216, 2009 WL 3429584, at *1 (E.D. Mo. Oct. 23, 2009) (same). The court disagrees. In both *Avante* and *Advanced Software*, the district court applied the *prior* version of § 1920(2). *Avante*, 2009 U.S. Dist. LEXIS 93522, 2009 WL 3259613, at *3; *Advanced Software*, 2009 U.S. Dist. LEXIS 99216, 2009 WL 3429584, at *1. Neither case mentions or discusses the 2008 amendment to the statute.

The court declines to award CRST the costs for videotaped depositions in addition to the costs for stenographic transcripts. The amended version of § 1920(2) permits costs for "[f]ees for printed *or* electronically recorded transcripts necessarily obtained for use in the case[.]" 28 U.S.C. § 1920(2) (emphasis added). In light of the use of the disjunctive in the amended language, the court determines that costs are taxable for either stenographic transcription *or* videotaped depositions--not both. *See United States v. Smith*, 35 F.3d 344, 346 (8th Cir. 1994) ("The ordinary usage of the word 'or' is disjunctive, indicating an alternative. Construing the word 'or' to mean 'and' is conjunctive, and is clearly in contravention of its ordinary usage."); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979) (stating that, in construing a statute,

courts are obliged to give effect, if possible, to every word Congress used, including "or"). It would be contrary to the plain language of § 1920 to allow CRST to recover costs for both stenographic transcripts and video costs for the same depositions. Accordingly, the court shall deny the Costs Motion.

2. Necessity of the videotaped depositions

Even if the court found that costs were taxable for both stenographic transcripts and video recordings, the court would not allow costs for video depositions because they were not "necessarily obtained for use in this case." 28 U.S.C. § 1920(2). CRST argues that the video depositions were "necessarily obtained for use at trial due to the large number of allegedly aggrieved individuals, whom CRST might have called adversely by presenting their videotaped testimony or impeached at trial with their videotapes." Bill of Costs Reply at 6. However, as the EEOC observes, "CRST has not identified a single EEOC class member who indicated that she would be unable to travel to, or testify at the scheduled trial in Cedar Rapids, Iowa." Costs Resistance at 4. CRST fails to rebut this claim. CRST argues that the video recordings would be more convenient and better show the deponent's credibility and demeanor. On these facts, the court concludes that the video recordings of the depositions were not necessary in this case. CRST has not offered any persuasive explanation as to why the stenographic transcripts would be insufficient for the purposes it identifies, much less why *both* stenographic transcripts *and* video recordings of the depositions might be needed. Accordingly, the court shall deny the Costs Motion.

Appendix E

V. ATTORNEYS' FEES & EXPENSES

A. Attorneys' Fees

CRST seeks $ 7,624,546.47 in attorneys' fees. The court first considers whether an award of attorneys' fees is warranted. Then, the court shall consider the amount of any award.

1. Legal background: fees in Title VII cases

Title VII provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). The court previously found that CRST is a "prevailing party" as to the EEOC. Order on Motion to Show Cause at 40. Accordingly, Title VII provides that the court may award CRST a "reasonable attorney's fee." *Id.*

In interpreting this provision, "the Supreme Court has distinguished between prevailing Title VII plaintiffs and prevailing Title VII defendants." *Marquart v. Lodge*

837, Int'l Ass'n of Machinists and Aerospace Workers, 26 F.3d 842, 848 (8th Cir. 1994). A district court may award attorneys' fees to a prevailing plaintiff "'in all but very unusual circumstances[.]'" *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)). However, an award of attorneys' fees to a prevailing defendant is appropriate in much more limited circumstances.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978), the Supreme Court outlined the principles that guide a district court's discretion when it decides whether to grant attorneys' fees to a prevailing defendant in a Title VII case. The Court explained:

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his [or her] action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421-22. The Eighth Circuit Court of Appeals has explained that this standard is designed "[t]o discourage the litigation of frivolous, unreasonable, groundless, or vexatious claims, but without discouraging the rigorous enforcement of federal rights under Title VII." *Marquart*, 26 F.3d at 849.

2. Attorneys' fees are warranted

CRST contends that it is entitled to an award of attorneys' fees because the EEOC "engaged in an unreasonable and vexatious course of proceeding, heedless of the fundamental principles of Title VII." CRST's Petition in Support of the Motion ("CRST Fees Brief") (docket no. 282-22), at 5. Specifically, CRST argues that the EEOC's failure to investigate, make a reasonable cause determination and attempt to conciliate the specific allegations of the 67 allegedly aggrieved persons prior to filing the Complaint was unreasonable and vexatious.

The EEOC first argues that it "had a strong basis for alleging class-wide sex harassment was occurring at CRST." Fees Resistance at 3. The EEOC points out that several claims survived motions for summary judgment and that the court acknowledged in its Order that "dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom" due to the EEOC's failure to investigate and conciliate those claims. *Id.* at 4-5 (citing Order at 38). The EEOC also asserts that "[t]he theory upon which the [c]ourt dismissed [the] EEOC's [C]omplaint is one that had never been used by any court contemplating an EEOC sex harassment case

brought on behalf of a group of women." *Id.* at 5. Thus, the EEOC contends that it had "no reason to anticipate dismissal on the basis of a flawed conciliation." *Id.*

The court finds that an award of fees is warranted in this case under the *Christiansburg* standard. The EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's prerequisites to suit. As the court observed in its Order on Motion to Show Cause:

> . The EEOC did not investigate the specific allegations of any of the 67 allegedly aggrieved persons until after the Complaint was filed. For example, the EEOC did not interview any witnesses or subpoena any documents to determine whether any of their allegations were true.
>
> . The EEOC did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's "class" until after it filed the Complaint. Indeed, prior to filing the Complaint, CRST enquired as to the size of the "class" and the EEOC responded that it did not know.
>
> . The EEOC did not make a reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint. Indeed, at the time the EEOC issued the Letter of Determination on

> July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons *had not yet been sexually harassed.* Indeed, most of these 27 women alleged they were sexually harassed *after the instant lawsuit was filed.* Although 38 of the remaining 40 allegedly aggrieved persons allege they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint. The EEOC used discovery in the instant lawsuit to find them.
>
> . The EEOC did not attempt to conciliate the specific allegations of the allegedly aggrieved persons prior to filing the Complaint.

Order on Motion to Show Cause at 31-32. The court relies on these findings to conclude that the EEOC's failure to comply with Title VII's jurisdictional conditions precedent--investigation, reasonable cause determination and conciliation--made this lawsuit unreasonable.

The EEOC contends that this action was not unreasonable because the court's dismissal on such grounds was unexpected. This argument is faulty for at least two reasons. First, as outlined in the court's Order on Motion to Show Cause, the EEOC's duties prior to seeking relief on behalf of allegedly aggrieved persons in a § 706 lawsuit are well-established. *See Id.* at 25-26 (discussing procedure of § 706 lawsuits as outlined in *Occidental Life Ins. Co. of Cal. v. EEOC,* 432 U.S. 355, 359-360, 97 S. Ct.

2447, 53 L. Ed. 2d 402 (1977)). Several courts, when faced with analogous facts, have "resisted the EEOC's attempts to perfect an end-run around Title VII's statutory prerequisites to suit." *Id.* at 32 (citing *EEOC v. Target Corp.*, No. 02-C-146, 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298 (E.D. Wis. May 16, 2007); *EEOC v. Outback Steakhouse of Fla., Inc.*, 520 F. Supp. 2d 1250, 1263-68 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 982-83 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc.*, 445 F. Supp. 985, 987-89 (W.D. Pa. 1978)). Second, the fact that relatively few courts have relied on such grounds to dismiss suits brought by the EEOC does not excuse the EEOC's tactics in the instant action or somehow make its lawsuit reasonable.

The EEOC's focus on the potential merit of the claims of several allegedly aggrieved women is a red herring. The court did not dismiss the Complaint because the remaining 67 allegedly aggrieved persons' claims were without foundation. Rather, the court did so "[b]ecause the EEOC did not investigate, issue a reasonable cause determination or conciliate the claims of the 67 allegedly aggrieved persons[.]" Order on Motion to Show Cause at 37 (citing *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC[.]")). The court noted that dismissal was a "severe but appropriate remedy" because to rule otherwise "would ratify a 'sue first, ask questions later' litigation strategy on the part of the EEOC, which would be anathema to Congressional intent." Order on Motion to Show Cause at 38.

The court finds that an award of attorneys' fees is appropriate because the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court. An award of fees is necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court.[4]

3. Legal background: amount of attorneys' fees award

"'The starting point in determining [reasonable attorneys' fees] is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates.'" *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005) (quoting *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 851 (8th Cir. 2002)). The lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992); *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir. 1993). "If the prevailing party did not achieve success on all claims,

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4. The court again makes no finding as to whether the trial attorneys for the EEOC acted in bad faith. *But see* Order on Motion to Show Cause at 38 n. 25 (discussing press release and statements regarding this lawsuit made by one of the EEOC's "higher-level attorneys") (citing *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) (opining that the EEOC may have avoided conciliation to make headlines and press its case against the employer in the media)).

[the lodestar] may be reduced, taking into account the most critical factor, 'the degree of success obtained,' with discretion residing in the district court." *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 580 (8th Cir. 2006) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).

The district court retains wide discretion in making a fee award. *See Hensley*, 461 U.S. at 437 ("We reemphasize that the district court has discretion in determining the amount of a fee award."). "This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* The district court must, however, "provide a concise but clear explanation of its reasons for the fee award." *Id.* "When an adjustment is requested on the basis of . . . [the] limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.*

A reasonable hourly rate is generally the prevailing market rate in the locale, that is, the "ordinary rate for similar work in the community where the case has been litigated." *Moysis v. DTG Datanet*, 278 F.3d 819, 828-29 (8th Cir. 2002) (quoting *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001)).

> To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence--in

> addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). "A rate determined in this way is normally deemed to be reasonable, and is referred to--for convenience--as the prevailing market rate." *Id.*

The prevailing party must also proffer evidence of the number of hours reasonably expended on the litigation. *Hensley*, 461 U.S. at 433.

> Inadequate documentation may warrant a reduced fee . . . . Incomplete or imprecise billing records preclude any meaningful review by the district court of the fee application for "excessive, redundant, or otherwise unnecessary" hours and may make it impossible to attribute a particular attorney's specific time to a distinct issue or claim.

H.J. Inc. v. Flygt Corp., 925 F.2d 257, 260 (quoting *Hensley*, 461 U.S. at 437).

"'[M]ost factors relevant to determining the amount of a fee are subsumed within the lodestar.'" *Casey*, 12 F.3d at 805 (quoting *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991)); *see Hensley*, 461 U.S. at 434 n.9 (citing *Copeland v. Marshall*, 641 F.2d 880, 890, 205 U.S.

App. D.C. 390 (D.C. Cir. 1980) (*en banc*) ("[I]t should be noted that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.")). However, the court should consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *McDonald v. Armontrout*, 860 F.2d 1456, 1459 (8th Cir. 1988).

> *Johnson* called for consideration of twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

McDonald, 860 F.2d at 1459 n.4. "[T]he most critical factor" in determining the reasonableness of an attorneys' fee award in civil rights litigation is "the degree of success obtained." *Hensley*, 461 U.S. at 436.

When making the determination of a reasonable fee, a court should consider the "plaintiff's overall success;

the necessity and usefulness of plaintiff's activity in the particular matter for which fees are requested; and the efficiency with which plaintiff's attorneys conducted that activity." *Jenkins v. Missouri*, 127 F.3d 709, 718 (8th Cir. 1997) (*en banc*). A district court need not address exhaustively every *Johnson* factor. *Emery*, 272 F.3d at 1048. The court should consider what factors, "in the context of the present case, deserve explicit consideration." *Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 997-98 (8th Cir. 1999). The district court should use its own knowledge, experience and expertise in determining the amount of the fee to be awarded. *Gilbert v. City of Little Rock*, 867 F.2d 1063, 1066-67 (8th Cir. 1989).

4. Lodestar

a. Reasonable hourly rate

CRST requests the following hourly rates for the services of the attorneys of its lead counsel, Jenner & Block ("Jenner"):

Attorney	Hourly Rate
John H. Mathias	$ 825
Robert T. Markowski	$ 666.67
Terri L. Mascherin	$ 675
Barry Levenstam	$ 650
James T. Malysiak	$ 600
Carla J. Rozycki	$ 525

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Attorney	Hourly Rate
Richard D. Campbell	$ 535
Brian D. Hansen	$ 525
Sarah Hardgrove-Koleno	$ 525
Brent E. Kidwell	$ 525
Sally K. Sears Coder	$ 525
John P. Wolfsmith	$ 525
Emma J. Sullivan	$ 495
J. Andrew Hirth	$ 361.67
Spiridoula Mavrothalasitis	$ 475
Melissa M. Hinds	$ 470
Suzzane M. Courtheoux	$ 445
Sean C. Herring	$ 410
Rayna M. Matczak	$ 410
Anne C. Fitzpatrick	$ 400
Benjamin J. Wimmer	$ 362.50
Sapna G. Lalmalani	$ 337.50
Sofia E. Biller	$ 325
Anne M. Gardner	$ 325
Justin A. Maleson	$ 325
Sarah R. McNally	$ 325
Ashley Schumacher	$ 325
Michele L. Slachetka	$ 325

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Attorney	Hourly Rate
Cheryl J. Kras (paralegal)	$ 256.67
Legal Assistants	$ 151.67
Other Billers (ATG, Library, etc.)	$ 238

CRST requests the following hourly rates for the services of the attorneys and support staff of its local counsel, Simmons Perrine Moyer & Bergman ("Simmons"):

Attorney	Hourly Rate
Kevin Visser	$ 295
Thomas Wolle	$ 200
Allison Heffern	$ 200
Iris Muchmore	$ 240
Dawn Gibson	$ 175
Kelly Geerlings (legal assistant)	$ 110
Marcia Harris	$ 165
Brian Fagan	$ 185
Deb Foege (legal assistant)	$ 95
Robert Hatala	$ 200
Webb Wassmer	$ 200
Eric Lam	$ 200

The reasonable hourly rate is generally the "ordinary rate for similar work in the community where the case

has been litigated." *Moysis*, 278 F.3d at 828-29 (quoting *Emery*, 272 F.3d at 1047). In some circumstances, however, the relevant market for determining a reasonable hourly rate may "extend beyond the local geographic community." *Casey*, 12 F.3d at 805. For example, in specialized areas of the law, the national market may provide a reasonable hourly rate. *Id.* Similarly, if a party is unable to retain local counsel, hourly rates may not be limited to the prevailing local rate. *See Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140-41 (8th Cir. 1982) (explaining that counsel may not be limited to lower local rates if the movant shows that it was unable to retain local counsel despite a diligent, good faith effort).

CRST asks the court to apply a "national rate" to assess the reasonableness of Jenner's hourly rates. The EEOC argues that a national rate is inappropriate and asks the court to "reduce the hourly rates of Jenner's lawyers to the hourly rates sought by lawyers [at Simmons] with comparable experience." Fees Resistance at 13. CRST does not argue that it was impossible to retain competent local counsel to handle this case. Rather, CRST contends that a "national rate" is appropriate in this case because Jenner is "nationally recognized for its accomplishments in major complex litigation." Fees Brief at 12.

Jenner's hourly rates are much higher than those charged by attorneys in this community. For example, Cheryl Kras, a Jenner paralegal, billed at a higher rate than all but one of the Simmons partners involved with this case. The lowest rate charged by Jenner associates, $325, was higher than any Simmons partner. John Mathias, the

lead Jenner partner in this case, billed at an average of $825 per hour--approximately four times that charged by some Simmons partners involved with this case. In short, it is clear to the court that Jenner's hourly rates are not the "ordinary rate for similar work in the community where the case has been litigated." *Moysis*, 278 F.3d at 828-29. Having found that Jenner's hourly rates are unreasonable when judged against rates charged for similar work in the community, the court turns to consider whether a different standard should be applied.

The court finds that this case did not involve a specialized area of the law that prevented CRST from retaining local counsel. Thus, the court declines to apply a national rate on this basis. CRST offers only general information regarding Jenner's reputation in "major commercial litigation," the type of clients it typically represents or the backgrounds of its lawyers involved in this case. Fees Brief at 12. While the Jenner attorneys involved in this case, and the firm as a whole, certainly have extensive experience in "major commercial litigation," the court finds that such experience does not rise to the level of a "specialized" area of the law. *Cf. Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517 (8th Cir. 1995) (per curiam) (applying Chicago market rate because attorneys "[did] this kind of work routinely" and were "leaders in the field of reproductive-rights law").

In its Reply, CRST argues that a national rate is appropriate because several of the Jenner attorneys involved in this case are "affiliated" with the firm's "Labor & Employment" practice. Fees Reply at 7. The court finds

that the participation of these attorneys does not warrant the application of a national hourly rate. Of the thirteen Jenner partners that billed in this case, only two, Carla Rozycki and Richard Campbell, are affiliated with the "Labor & Employment" practice. The hours billed by Rozycki and Campbell constitute approximately 12% of the total hours billed by Jenner partners in this case. The court notes that several Jenner associates affiliated with the "Labor & Employment" practice also worked extensively on this case. However, as CRST its notes, the Jenner attorneys affiliated with that practice worked only "25% of the total time that [Jenner] spent defending CRST." *Id.* at 8. The court also notes that several Simmons attorneys involved in this case, including partners Kevin Visser and Thomas Wolle, have significant experience in employment litigation, as do many other lawyers in this community. CRST has not shown that, despite a good faith effort to secure adequate local counsel, it was unable to do so. Accordingly, the court declines the apply a national rate based on the unavailability of competent local counsel.

The court notes that several factors in this case warrant a large fee award. Specifically, CRST's counsel successfully obtained a dismissal of the entire case. The case involved hundreds of allegedly aggrieved individuals and potentially massive liability to CRST. Jenner's attorneys have significant experience and outstanding reputations in large, high-stakes litigation. However, the court finds that Jenner's hourly rates are unreasonable in light of the prevailing rates for similar work in the community. CRST has failed to satisfy its burden to show that "the requested rates are in line with those prevailing

in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n. 11. The court also concludes that the circumstances do not warrant a departure from the general practice of computing a reasonable hourly rate based on the local community. As the Eighth Circuit Court of Appeals has explained:

> We do not . . . compute fees mechanically and without question on the basis of the hourly fee that a lawyer regularly charges in fact. It remains our duty to fix a fee that is reasonable and, as part of that process, to determine a reasonable hourly rate. Automatic acceptance of a lawyer's customary charge would be an abdication of our duty to supervise the conduct of the bar and do justice to the losing as well as to the winning side. This court does not accept the attorneys' usual billing rate as definitively fixing their billing rates for this litigation.

Avalon Cinema Corp., 689 F.2d at 140 (citations and quotation marks omitted).

The court finds it is appropriate to reduce the rates charged by Jenner's attorneys and Jenner's personnel to levels comparable to that of the Simmons attorneys. Accordingly, the court shall reduce the hourly rates of Jenner partners to $ 295 and the hourly rates of Jenner associates to $ 175. The hourly rates of Jenner paralegals, legal assistants and other support staff are reduced to $ 110. These hourly rates shall be used to calculate the lodestar.

b. Reasonable hours spent

The EEOC argues that "CRST is not entitled to most of the fees it incurred because they could have been avoided." Fees Resistance at 8. Specifically, the EEOC contends that the theory on which CRST ultimately obtained dismissal of this suit--the EEOC's failure to investigate, make reasonable cause determinations and conduct conciliation efforts of specific allegations--could have been raised earlier. The EEOC argues that CRST could have avoided costly discovery and motion practice had this issue been raised earlier.

The court finds that this argument is without merit. CRST first raised these issues on November 6, 2008, when it filed its first "Motion Under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members" ("Motion to Show Cause") (docket no. 56). Specifically, CRST argued that "[t]he EEOC has effectively abdicated its responsibility to investigate potential claims before pursuing them and instead imposed a large, unfair burden to both CRST and the [c]ourt to sort things out." Brief in Support of Motion to Show Cause (docket no. 56-1), at 9. The court declined to strike any of the allegedly aggrieved persons identified by the EEOC at that time because the EEOC represented that "it had a good faith belief that each and every one of the approximately 270 [allegedly aggrieved persons] ha[d] an actionable claim for sex discrimination." Order on Motion to Show Cause (docket no. 66), at 8. On April 30, 2009, the court dismissed the EEOC's pattern or practice claim. On May 8, 2009, CRST filed a "Motion for Leave to File Motion for Order

to Show Cause Why [the EEOC's] Section 706 Claims on Behalf of Allegedly Aggrieved Persons Should Not Be Dismissed" (docket no. 217). CRST argued that, in light of the dismissal of the EEOC's pattern or practice claim, the "EEOC cannot show that it has satisfied Title VII's preconditions for filing suit on behalf of any individuals other than plaintiffs/interveners Starke and Peeples." *Id.* at 1. The EEOC's argument that CRST should have raised this issue earlier to avoid fees overlooks that fact that CRST raised it as early as November, 6, 2008, and again raised it shortly after the court dismissed the EEOC's pattern or practice claim, which the EEOC had relied upon to bring the claims of many of the allegedly aggrieved persons.

The EEOC does not otherwise object to the amount of hours spent on this case by CRST's counsel. CRST provided detailed documentation in support of these totals. After reviewing this documentation, the court finds that the hours expended by CRST's counsel on this case were largely reasonable. This case was exceptionally large and complex. It required significant discovery--nearly 200 depositions--and dozens of motions. The records also reveal that CRST's counsel efficiently utilized a range of attorneys, paralegals and legal assistants to perform work appropriate for their experience and expertise.

However, for the reasons set forth in Section V.B.5., *infra*, the court finds that the time expended by CRST's counsel to prepare for and participate in a mock jury exercise was unreasonable. The court has reviewed Jenner's billing statements and has identified the time

entries related to the mock jury exercise. The billing records reveal that Jenner attorneys billed $ 62,823.75 for work exclusively related to the mock jury exercise. This amount must be adjusted based on the reasonable hourly rates determined by the court in Section V.A.4.a.i., *supra*. After adjustment, the fees charged by Jenner for work exclusively related to the mock jury exercise total $ 25,687.50. The court shall exclude this amount from the award of attorneys' fees.

The billing records also reveal $ 171,553.75 of time entries that include, among other tasks, work related to preparation for the mock jury exercise. After adjusting this amount based on the previously determined hourly rates, this amount totals $ 74,048.75. However, because these entries also include one or more unrelated tasks, such as legal research and writing, it is impossible for the court to discern how much of this time was billed for work related to the mock jury exercise and how much was devoted to the other activities. Based on a review of these entries, the court concludes that it is appropriate to reduce this amount by half, or $ 37,024.38, to account for the time billed for work related to the mock jury exercise. In sum, the court declines to award $ 62,711.88 in attorneys' fees related to the mock jury exercise.

c. *Lodestar amounts*

Jenner attorneys and support staff billed a total of 18,005.75 hours on this case. CRST seeks a total of $ 7,121,569.25 for this work. As previously discussed, the court reduces the hourly rates of Jenner attorneys to the rates of Simmons attorneys and staff. The converted rates are set forth below.

Attorney	Hours	Reasonable Rate	Reductions[5]	Award
John H. Mathias (partner)	625.25	$ 295	$ 17,817.75	$ 166,631.00
Robert T. Markowski (partner)	1,591.00	$ 295	$ 58,613.50	$ 410,731.50
Terri L. Mascherin (partner)	39.00	$ 295	$ 3,044.25	$ 8,460.75
Barry Levenstam (partner)	5.00	$ 295	$ 0	$ 1,475.00
James T. Malysiak (partner)	1,185.25	$ 295	$ 60,049.50	$ 289,599.25
Carla J. Rozycki (partner)	181.50	$ 295	$ 13,335.00	$ 40,207.50

5. The "Reductions" column reflects fees that Jenner billed to CRST, but, for various reasons, does not seek to recover in the Fees Motion. The court re-calculated the "Reductions" by determining the recoverable percentage of a timekeeper's rate and reducing the Reduction to keep it consistent with the timekeeper's reduced rate. For example, the court determined Mr. Mathias's "Reduction" as follows: (1) the court determined that the reasonable hourly rate of $ 295 was 36% of Mr. Mathias's claimed hourly rate of $ 825; (2) the court re-calculated the "Reduction" by multiplying the original "Reduction" of $ 49,493.75 by 36%, which equals $ 17,817.75.

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Attorney	Hours	Reasonable Rate	Reductions[5]	Award
Richard P. Campbell (partner)	618.25	$ 295	$ 8,373.75	$ 174,010.00
Brian D. Hansen (partner)	133.00	$ 295	$ 2,866.50	$ 36,368.50
Sarah Hardgrove-Koleno (partner)	674.00	$ 295	$ 882.00	$ 197,948.00
Brent E. Kidwell (partner)	.50	$ 295	$ 0	$ 147.50
Sally K. Sears Coder (partner)	1,409.25	$ 295	$ 51,891.00	$ 363,837.75
John P. Wolfsmith (partner)	150.50	$ 295	$ 2,058	$ 42,339.50
Emma J. Sullivan (of counsel)	1,360.50	$ 295	$ 7,499.25	$ 393,848.25
J. Andrew Hirth (associate)	1,512.75	$ 175	$ 11,160	$ 253,571.25
Spiridoula Mavrothalasitis (associate)	316.25	$ 175	$ 2,021.13	$ 53,322.62

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Attorney	Hours	Reasonable Rate	Reductions[5]	Award
Melissa M. Hinds (associate)	4.00	$ 175	$ 0	$ 700.00
Suzanne M. Courtheoux (associate)	108.00	$ 175	$ 1,128.08	$ 17,771.92
Sean C. Herring (associate)	78.00	$ 175	$ 0	$ 13,650
Rayna M. Matczak (associate)	156.25	$ 175	$ 0	$ 27,343.75
Anne C. Fitzpatrick (associate)	364.25	$ 175	$ 0	$ 63,743.75
Benjamin J. Wimmer (associate)	267.50	$ 175	$ 900.00	$ 45,912.50
Sapna G. Lalmalani (associate)	807.25	$ 175	$ 2,730	$ 138,538.75
Sofia E. Biller (associate)	10.75	$ 175	$ 0	$ 1,881.25
Anne M. Gardner (associate)	88.50	$ 175	$ 0	$ 15,487.50

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Attorney	Hours	Reasonable Rate	Reductions[5]	Award
Justin A. Maleson (associate)	216.75	$ 175	$ 0	$ 37,931.25
Sarah R. McNally (associate)	53.75	$ 175	$ 0	$ 9,406.25
Ashley M. Schumacher (associate)	734.00	$ 175	$ 2,193.75	$ 126,256.25
Michele L. Slachetka (associate)	1,028.00	$ 175	$ 2,193.75	$ 177,706.25
Cheryl L. Kras (paralegal)	2,273.50	$ 110	$ 12,989.23	$ 237,095.77
Legal Assistants	1,961	$ 110	$ 3,164.55	$ 212,545.45
Other Billers (*e.g.*, Library)	51.25	$ 110	$ 0	$ 5,637.50
Totals	18,005.75			$ 3,564,106.51

The above hours, multiplied by the reasonable hourly rates, total $ 3,564,106.51 in attorneys' fees. The court deducts $ 62,711.88 from this amount for fees billed by Jenner attorneys related to the mock jury exercise. This yields a lodestar amount of $ 3,501,394.63 in attorneys' fees for the services of Jenner.

Simmons attorneys and support staff billed a total of 2,507.66 hours working on this case at rates ranging from $ 95 to $ 295. CRST seeks a total of $ 502,977.02 for this work. The EEOC does not object to the hourly rates charged by the Simmons attorneys or staff. The court finds that the hourly rates and hours billed by Simmons are reasonable and consistent with the prevailing market rate for similar work in the community. Accordingly, the court shall award CRST $ 502,977.02 in attorneys' fees billed by Simmons.

5. Summary

The court has calculated a lodestar amount of $ 3,501,394.63 for Jenner's services and a lodestar amount of $ 502,977.02 for Simmons' services. This yields a total of $ 4,004,371.65 in attorneys' fees.

B. Reasonable out-of-pocket expenses

CRST asks the court to award it $ 816,864.95 for out-of-pocket expenses incurred by its attorneys. These expenses are comprised of the following: long distance telephone expenses, messenger and overnight express, fees for investigators, expert witness fees, mock jury

fees, computer legal research, postage, travel and related expenses, demonstrative aids for trial, fees incurred in preparation of the Fees Motion, costs for videotaped depositions,[6] costs to convert depositions to DVD and costs for "exemplification and copies of papers[.]"[7] Fees Supplement at 4. "[R]easonable out-of pocket expenses of the kind normally charged to clients by attorneys," but not recoverable as costs under 28 U.S.C. § 1920, may be "included as part of the reasonable attorney's fees awarded." *Pinkham v. Camex, Inc.*, 84 F.3d 292, 294-95 (8th Cir. 1996); *see also Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, No. C00-35-LRR, 2004 U.S. Dist. LEXIS 10164, 2004 WL 1234130, at *6 (N.D. Iowa June 2, 2004) (Reade, C.J.) ("Reasonable out-of-pocket expenses incurred by an attorney which normally would be charged to a fee-paying client ordinarily are includable in a statutory award of fees."). The EEOC argues that certain expenses should be disallowed in their entirety while others should be disallowed due to documentation problems. The court shall address each of these expenses, in turn.

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6. This amount includes $ 70,855.52 for expenses incurred to videotape depositions. As discussed in Section IV.B, *supra*, CRST also seeks this amount as costs under 28 U.S.C. § 1920. In light of the court's conclusion that this expense is not recoverable under § 1920, CRST asks that this expense "be considered as attorneys' fees in the event the Court does not award them pursuant to § 1920." Fees Supplement at 2.

7. In the Fees Motion, CRST seeks $ 569,564.64 for expenses. In the Fees Supplement, CRST asks the court to award an additional $ 247,300.31, because the Clerk declined to award these expenses as costs pursuant to 28 U.S.C. § 1920.

Appendix E

1. Long distance telephone expenses

CRST seeks $ 176.17 in long distance telephone expenses. The EEOC does not specifically object to this expense. The court finds that these charges are adequately documented and reasonable. Therefore, the court shall award CRST $ 176.17 for long distance telephone expenses as part of the attorneys' fee award.

2. Messenger and overnight express

CRST seeks $ 5,127.86 in messenger and overnight delivery expenses. The EEOC does not specifically object to this expense. The court finds that these charges are adequately documented and reasonable. Accordingly, the court shall award CRST $ 5,127.86 for messenger and overnight expenses as part of the attorneys' fee award.

3. Investigator fees

CRST also seeks to recover fees it spent to employ investigators. CRST argues that investigators were "necessary to the litigation in order to locate and interview witnesses." Fees Brief at 21. CRST has been billed $ 103,523.07 for private investigation work. Apparently, CRST is "disputing that amount, and believes that it should have been invoiced for no more than $ 62,183.67." *Id.* at 22. Accordingly, CRST asks the court to award it $ 62,183.67 for its private investigator fees.

The EEOC argues that the investigators were unnecessary. Specifically, the EEOC contends that much

of the investigative work took place after the close of discovery and involved "newly identified witnesses" that the EEOC argues could not have been used at trial. Fees Resistance at 15. Alternatively, the EEOC argues that the investigator fees should be "substantially reduced" because the investigators billed excessive hours and charged "exorbitant" hourly rates. *Id.* at 15-16.

Investigator fees are recoverable as out-of-pocket expenses that would ordinarily be passed onto the client. *See, e.g., Knutson v. Ag Processing, Inc.*, 273 F. Supp. 2d 961, 1021-22 (N.D. Iowa 2003) (awarding as reasonable out-of-pocket expenses fees to retain a "legal investigator" who interviewed witnesses, performed witness preparation and prepared documents) *rev'd on other grounds*, 394 F.3d 1047 (8th Cir. 2005). CRST contends it used the investigators to locate the individuals accused of sexual harassment, as well as "other individuals who may have had knowledge of certain claims[.]" Fees Reply at 9. CRST claims that locating and interviewing these people was difficult because: (1) many of the allegedly aggrieved persons identified "new and additional harassers" during discovery; (2) many of the accused individuals no longer worked for CRST; (3) the witnesses were "dispersed across the country"; and (4) CRST had "a tight time frame" in which to conduct its investigation. *Id.*

The court finds that CRST's use of investigators was warranted and reasonable in this case. Due to the large number of allegedly aggrieved persons and alleged harassers, the geographic disparity of these individuals and the fact that more than one hundred of the alleged

harassers no longer worked at CRST, the use of private investigators was appropriate.

The court also rejects the EEOC's argument that the investigator fees should be "substantially reduced" either because the number of hours billed by the investigators was excessive or because their hourly rates were "exorbitant." Fees Resistance at 15-16. Specifically, the EEOC argues that, "[g]iven the excessive time spent supervising rather than actually investigating, the number of investigator hours should be reduced by 50%." *Id.* at 16. The court disagrees that investigator fees associated with monitoring and assigning investigative work should be excluded or reduced. The employment of numerous investigators in various parts of the country undoubtedly required supervision and coordination. In fact, the supervision likely *improved* the efficiency of the investigators' work by preventing duplicative or needless effort. Finally, the court finds that the hourly rates paid to the investigators were reasonable. The hourly rates ranged from $ 105 to $ 300. These rates are reasonable for the tasks performed, which included locating and interviewing witnesses and drafting memoranda to summarize the investigation. Further, CRST has elected to not seek more than $ 40,000 in investigative fees because it found certain hourly rates objectionable. Accordingly, the court shall award CRST $ 62,183.67 in out-of-pocket expenses for investigator fees as part of its attorneys' fees award.

4. Expert witness fees

CRST seeks $242,212.22 in expert witness fees for the work of two expert witnesses CRST. This amount consists of $ 104,866.66 billed by Dr. Jone McFadden Papinchock, an expert in "Industrial and Organizational Psychology." Fees Brief at 22. Dr. Papinchock's work included research and analysis of CRST's sexual harassment policies and practices, consultation with CRST's counsel, preparation of an expert report and deposition testimony. The remaining $ 137,345.56 in expert fees are sought for the work of Dr. Mary Dunn Baker. Dr. Baker has a Ph.D. in Economics. Dr. Baker prepared an expert report and conducted statistical analyses of the gender composition of CRST's workforce and the frequency of sexual harassment at CRST. CRST submitted documentation of these expenses, including invoices and detailed billing reports.

The EEOC objects to the expert witness fees to the extent that they could have been avoided if CRST had moved for and obtained dismissal of this case at an earlier stage. For the reasons stated in Section V.A.4.b., *supra*, the court rejects this argument. The court has reviewed the documentation of these expenses and finds that the fees are reasonable. Accordingly, the court shall award CRST $242,212.22 as an out-of-pocket expense for expert witness fees.

5. Mock jury fees

CRST seeks an award of $74,640.23 for fees expended on a mock jury exercise. CRST contends that the mock

jury exercise was "reasonably necessary to address the complex and complicated issues, significant strategic decisions, novel issues, and sheer volume of claims involved in this case, including the potential for a jury to hear arguments regarding claims of over 156 women, testimony of up to 405 witnesses, and presentation of up to 3,043 exhibits." *Id.* at 24. CRST states that it held the exercise before the court ruled on its dispositive motions and that, although this case did not ultimately go to trial, the exercise "provided significant value to CRST's litigation strategy, including its drafting of the Pretrial Order, witness and exhibit lists, and motions *in limine*." *Id.* CRST submitted documentation of this expense. The EEOC does not object to the propriety of an award for the mock jury exercise or to the specific amount sought.

Several courts have awarded expenses for the costs of a "mock jury" or similar exercise. **See** *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, No. CV 00-1693-A, 2003 U.S. Dist. LEXIS 25830, 2003 WL 23715982, at *8 (D. Or. Oct. 27, 2003) (collecting cases) *vacated on other grounds, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007). However, the court finds that CRST's decision to conduct a mock jury was not reasonably necessary to further the litigation in this case. *See Goss*, 2004 U.S. Dist. LEXIS 10164, 2004 WL 1234130, at *7 (denying reimbursement for attorneys' fees or expenses incurred in connection with a mock jury exercise). Accordingly, the court denies CRST's request for $ 74,640.23 in expenses for the mock jury exercise.

6. Computer legal research

CRST seeks an award of $ 70,780.61 in computerized legal research expenses. However, it is well-settled in the Eighth Circuit that "computer-aided research, like any other form of legal research, is a component of attorneys' fees and cannot be independently taxed as an item of cost in addition to the attorneys' fee award." *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 325 (8th Cir. 1993) (quoting *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 695 (8th Cir. 1983). "[C]omputer-based legal research must be factored into the attorneys' hourly rate, hence the cost of the computer time may not be added to the fee award." *Id.* Accordingly, CRST is not entitled to any award for computer-based legal research.

7. Postage

CRST seeks $ 49.84 for postage expenses incurred by Jenner and billed to CRST. The EEOC does not object to this expense or the amount CRST requests. The court finds that this expense is reasonable. Accordingly, the court shall award CRST $ 49.84 in postage expenses as part of the attorneys' fee award.

8. Travel and related expenses

CRST seeks $ 34,914.06 in compensation for travel expenses. This amount includes costs incurred to attend hearings, depositions and to review documents, as well as "meals while out of the office." Fees Brief at 25. The EEOC objects to $ 3,375.89 of this amount on the grounds

that CRST did not provide supporting documentation for certain expenses. In reply, CRST offered additional documentation to support some the travel expenses to which the EEOC objects. *See* Fees Reply Ex. B-D (docket no. 300-2 through 300-4). However, CRST fails to provide the underlying invoices or copies of receipts for several claimed travel expenses totaling $ 778.12. As a result, the court is unable to assess the reasonableness of these expenses. The remaining amounts are supported by adequate documentation and are reasonable. CRST has reduced its request for travel expenses by excluding items the court would consider discretionary expenditures. Further, the court finds that such expenses are of the type normally passed on to a fee-paying client. Accordingly, the court shall award CRST $ 34,135.94 for the travel expenses of its counsel.

9. Demonstrative exhibits for trial

CRST seeks $ 78,023.24 for expenditures on demonstrative exhibits for trial. However, the court has reviewed the documentation for these expenses and can identify only $ 77,125.25 in expenditures. This amount consists of $ 841 paid to "T&M Services, Inc." to "move furniture to storage." CRST Fee Application Attachment 7I (docket no. 282-21), at 3. The remaining $ 76,284.25 was paid to "TrialGraphix" to "begin preparation of trial exhibits." Fees Brief at 5. The EEOC objects to the entire amount on the grounds that the expenses are too vague and imprecise to allow the court to conclude if these expenses are reasonable.

The court finds that the documentation supporting this expense is insufficient and the court shall therefore deny this request in its entirety. The $ 841 invoice from T&M Services states only that the fee was paid to "COMPLETE MQVES, MOVE FURNITURE TO STORAGE." CRST Fee Application Attachment 7I at 3 (emphasis in original). Similarly, the TrialGraphix invoice states that CRST paid TrialGraphix $ 75,000 for "Processing/Stamping & Printing/Binding Project Special Pricing." *Id.* at 4. The court is unable to discern from the documentation what services were performed and how they relate to this lawsuit. Without this information, the court cannot meaningfully consider whether these expenses are reasonable. *See, e.g., H.J. Inc.*, 925 F.2d at 260-61 (discussing propriety of reducing fee award based on inadequate documentation). Accordingly, the court shall deny CRST's request for expenses related to demonstrative exhibits.

10. Videotaped depositions

As discussed in Section IV.B.1-2., *supra,* the court declines to award CRST $ 70,855.52 for videotaped depositions under § 1920. CRST argues that it is nonetheless entitled to this amount as part of the attorneys' fee award. For the reasons previously discussed, the court finds that this expense was unnecessary and unreasonable. *See Jadari v. Shiba Inv., Inc.*, No. 06-5012-RHB, 2008 U.S. Dist. LEXIS 98204, 2008 WL 5100812, at *10 (D.S.D. Dec. 3, 2008) (awarding costs of court reporter but denying expenses for videotaped depositions as an "unreasonable" expense). CRST also obtained stenographic transcripts of

the depositions and has not offered a persuasive reason for obtaining both stenographic transcripts and video recordings of every deposition. Even if this case had gone to trial, CRST has not shown that any witnesses were likely to be unavailable or that video recordings of depositions would otherwise be useful. Accordingly, the court shall deny this portion of CRST's fee request.

11. Additional video-related expenses

CRST also seeks $ 57,259.24 for its "costs of conversion of depositions to DVD, ASCII, condensation, postage, and delivery[.]" Fees Supplement at 4. In light of the court's conclusion that the videotaping of depositions was an unreasonable expenditure, the court declines to award these additional video-related expenses.

12. Exemplification and copies of papers

CRST requests "costs for exemplification and copies of papers in the amount of $ 119,185.55." *Id.* CRST originally sought this amount under 28 U.S.C. § 1920, which allows an award of such costs "where the copies are necessarily obtained for use in the case." 28 U.S.C. § 1920(4). The EEOC objected on the grounds that CRST's documentation was too vague and failed to identify what was printed and or/copied. The EEOC contended that this made it impossible to evaluate whether these copies were necessarily obtained for use in the case. The Clerk concluded that CRST's documentation was insufficient because it did not identify the purpose for the printing and copying and therefore refused to tax this amount as costs.

CRST now seeks this amount as reasonable out-of-pocket expenses as part of the attorneys' fee award.

The court finds that CRST is entitled to an award of the expenses incurred by its counsel for copying and printing. CRST submitted extensive documentation of its printing and copying costs.[8] This amount includes in-house printing by CRST's counsel, the rental of printing and/or copying machines and printing services by third parties. The court finds the documentation sufficient and the amount sought is reasonable in light of the thousands of documents, extensive research and motion practice that this case required. Although this expense may have been insufficiently documented to be taxed as costs, it is recoverable as part of the reasonable attorneys' fees. *See, e.g., Emmenegger v. Bull Moose Tube Co.*, 33 F. Supp. 2d 1127, 1133-34 (E.D. Mo. 1998) (refusing to tax photocopying expenses as costs under § 1920 because plaintiffs failed to segregate the taxable costs but awarding full amount as part of attorneys' fee award). Accordingly, the court shall award CRST $ 119,185.55 for its printing and copying expenses.

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8. Much of the documentation consists of printouts from Jenner's "nQueue" tracking software, which tracks printing and copying costs based on client matter numbers and then uploads the automated transactions to Jenner's billing system "in order to recover the costs associated with the print/copy work." Bill of Costs Schedule D (docket no. 280-4), at 2.

13. Fees for preparation of fee application

CRST stated in its Brief in support of the Fees Motion that it sought an award of the fees incurred to prepare the Fees Motion and that it would "submit a supplemental filing detailing the total fees incurred with preparation of this petition once briefing is concluded." Fees Brief at 26. In the Supplement, however, CRST states that it "seeks only the nominal fees incurred in preparation of its Fee Petition that have already been submitted to the Court." Supplement at 2. The court interprets this to mean that CRST does not seek additional attorneys' fees for preparation of the Fees Motion other than the fees that the court has already considered. Accordingly, the court does not award an additional amount for the preparation of the Fees Motion.

14. Summary

Based on the foregoing, the court finds that CRST is entitled to an award of reasonable out-of-pocket expenses in the amount of $ 463,071.25. This amount will be added to the $ 4,004,371.65 the court shall award for the services of CRST's counsel. This yields a total attorneys' fee award of $ 4,467,442.90.

VI. CONCLUSION

In light of the foregoing, it is **HEREBY ORDERED THAT:**

(1) The Costs Motion (docket no. 306) is **DENIED;**

(2) The Fees Motion (docket no. 282) is **GRANTED IN PART AND DENIED IN PART** as follows:

(a) The EEOC is **ORDERED** to pay CRST **$ 4,004,371.65** in attorneys' fees; and

(b) The EEOC is **ORDERED** to pay CRST **$ 463,071.25** in expenses, for a total attorneys' fees award of **$ 4,467,442.90;**

(4) The Clerk of Court is **DIRECTED** to **ENTER JUDGMENT** in favor of CRST in the amount of **$ 4,560,285.11.** This figure includes attorneys' fees, expenses and the costs taxed in favor of CRST pursuant to 28 U.S.C. § 1920; and

(5) The Clerk of Court is **DIRECTED** to **CLOSE THIS CASE.**

DATED this 9th day of February, 2010.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX F — SUMMARY JUDGMENT ORDER ON TWO OR MORE GROUNDS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED JULY 9, 2009

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

BARBARA GRANT, CINDY MOFFETT, LATESHA
THOMAS AND NICOLE ANN CINQUEMANO,

Plaintiffs-Intervenors,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

July 9, 2009, Decided
July 9, 2009, Filed

LINDA R. READE, CHIEF JUDGE, U.S. DISTRICT JUDGE.

Appendix F

ORDER

I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s "Motion for Summary Judgment Against Class Members Whose Claims Fail on Two or More Grounds" ("Motion") (docket no. 149).

II. RELEVANT PRIOR PROCEEDINGS[1]

On February 13, 2009, Defendant CRST Van Expedited, Inc. ("CRST") filed the Motion. On March 16, 2009, Plaintiff Equal Employment Opportunity Commission ("the EEOC") filed a Resistance (docket no. 166). On March 31, 2009, CRST filed a Reply (docket no. 179).

CRST requests oral argument on the Motion, but the court finds oral argument is not appropriate. *See* LR 7(c). The Motion is fully submitted and ready for decision.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving

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1. The court assumes complete familiarity with the prior proceedings.

party' on the question." *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g., Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578

(8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

IV. RELEVANT LAW

The relevant law is set forth in the court's Order (docket no. 256) of July 6, 2009 and Order (docket no. 251) of June 18, 2009. The court need not repeat the relevant law here.

V. THE MERITS

A. Outline of Arguments

In the Motion, CRST asks the court to bar the EEOC from seeking relief on behalf of fifty-five allegedly aggrieved persons.[2] CRST argues the EEOC has provided the court with insufficient evidence to prove that these fifty-five allegedly aggrieved persons suffered actionable sexual harassment. With respect to nearly all of the fifty-five allegedly aggrieved persons, CRST argues (1) the allegedly aggrieved person did not suffer severe or pervasive sexual harassment and, in the alternative, (2) there is insufficient evidence CRST knew or should have known of the alleged sexual harassment but failed to take proper remedial action.

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2. The Motion lists only fifty-four allegedly aggrieved persons, but the court previously indicated it would consider the allegations of Ms. Linda Skaggs in conjunction with the instant Order. *See* Order (docket no. 223), at 22-23, 26.

The EEOC concedes four of the fifty-five allegedly aggrieved persons, Mss. Kathy Cannoles, Madeline Lovins, Laura Taylor and Laurie Thompson, did not suffer actionable sexual harassment. The EEOC resists the remainder of the Motion in its entirety.

B. Rulings

The court need not catalogue all of the sordid facts relating to each of the fifty-five allegedly aggrieved persons at issue in the Motion. After considering the parties' arguments in conjunction with the voluminous record before the court, the court rules as follows:

1. The EEOC concedes four women did not suffer actionable sexual harassment

On April 30, 2009, the court held that, to the extent the EEOC purported to assert a "pattern or practice claim" in this litigation, such claim must be dismissed. *See* Order (docket no. 197), *passim*. In light of such ruling, the EEOC concedes Mss. Kathy Cannoles, Madeline Lovins, Laura Taylor and Laurie Thompson did not suffer actionable sexual harassment.[3] Accordingly, the court shall grant

3. The EEOC's unwritten premise—that the mere presence of a "pattern or practice claim" would somehow save the "individual claims" of Mss. Cannoles, Lovins, Taylor and Thompson—is unsupported and unsound. *See, e.g.*, Order (docket no. 197), at 26-32 (discussing *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997) and the EEOC's flawed proposal for a burden-shifting framework for sexual harassment cases); Order (docket no. 156), at 5-6 (foreclosing the EEOC from seeking "class-wide" punitive damages).

the Motion in part and bar the EEOC from seeking relief on behalf of them at trial.

2. The court already barred the EEOC from seeking relief on behalf of two women

On May 13, 2009, the court held the EEOC was judicially estopped from seeking relief on behalf of Mss. Christina Payne and Robin Timmons at trial, because they had failed to disclose their sexual harassment claims in their bankruptcy proceedings. Accordingly, the court shall deny the Motion in part as moot.[4]

3. A reasonable jury could not find forty-two women suffered actionable sexual harassment.

A reasonable jury could not find forty-two of the allegedly aggrieved persons at issue in the Motion suffered actionable sexual harassment. Specifically, the court holds:

For the reasons expressed in Part V.B. 1 of the court's Order (docket no. 256) of July 6, 2009, the court shall grant the Motion in part and hold that a reasonable jury could not find that two women, Mss. Sylvia Griffith

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4. Even if the court had not already barred the EEOC from seeking relief on behalf of Mss. Payne and Timmons, the court would do so now. Ms. Payne did not suffer severe or pervasive sexual harassment. There is insufficient evidence in the summary judgment record to show that CRST knew or should have known Ms. Timmons was sexually harassed yet failed to take prompt and effective remedial action.

and Linda Skaggs, suffered severe or pervasive sexual harassment. The court need not decide whether there is sufficient evidence in the summary judgment record to show that CRST knew or should have known Ms. Griffith or Ms. Skaggs suffered sexual harassment yet failed to take proper remedial action.

For the reasons expressed in Parts V. A and V. B of the court's Order (docket no. 251) of June 18, 2009, the court shall grant the Motion in part and hold that there is insufficient evidence in the summary judgment record to show that CRST knew or should have known that the following nineteen women suffered sexual harassment yet failed to take proper remedial action: Mss. Antoinette Baldwin, Mary Beaton, Natasha Brown, Catherine Coronado, Catherine Fletcher, Angelene Gatewood, Zainabu Jenga, Diane Johnson, Bonnie Moesch, Leah Meyers-Graham, Tammi Pile, Sharon Pinchem, Donna Quigley, Danette Quintanilla,[5] Janet Ranney, Kathleen Seymour, Mary "Emily" Smith, Jennifer Susson and Betsy Ybarra. The court need not decide whether any of these nineteen women suffered severe or pervasive sexual harassment.

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5. The EEOC does not argue CRST should have known of the sexual harassment of Ms. Quintanilla because there is circumstantial evidence to show that CRST knew her harasser had previously sexually harassed another woman but did not take reasonable steps to prevent recidivism. The court deems any such argument to be waived. *Cf.* Order (docket no. 251), at 10 (declining to bar the EEOC from seeking anything less than full relief at trial on behalf of three women, because there was circumstantial evidence to show CRST knew their harassers had previously sexually harassed other women and did nothing about it).

Appendix F

With respect to twenty-one women, Mss. Kristi Allen, Linda Connor, Tamara Demery, Dorothy Dockery, DeQuinda Harris, Debra Hindes, Tracy Hughes, Brenda Kennett,[6] Patricia Marzett, Virginia Mason, Lucinda McBlair, Nona McCuien, Rosalyn McDaniels, Darlene Miller, Sherry O'Donnell, Shirley Parker, Sheree Phillips, Peggy Pratt, Jonne Shepler, Christine Taylor and Sharon Wyrick, the court grants the Motion in its entirety. The claims of these twenty-one women fail on multiple grounds. For the reasons expressed in Part V.B. 1 of the court's Order (docket no. 256) of July 6, 2009, the court holds that a reasonable jury could not find that any of these twenty-one women suffered severe or pervasive sexual harassment. In the alternative, for the reasons expressed in Parts V.A and V.B of the court's Order (docket no. 251) of June 18, 2009, the court holds there is insufficient evidence in the summary judgment record to show that CRST knew or should have known that any of the foregoing twenty-one women suffered sexual harassment yet failed to take proper remedial action.

Accordingly, the court shall grant the Motion in part and bar the EEOC from seeking relief on behalf of the foregoing forty-two women at trial.[7]

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6. Mr. Larry Caruso's actions do not constitute severe or pervasive sexual harassment. There is no evidence Ms. Kennett reported the actions of any other coworkers to CRST.

7. The court notes that the EEOC did not make the argument set forth in Part V.D of the court's Order (docket no. 251) of June 18, 2009. The court deems any such argument for partial relief to be waived.

4. A reasonable jury could find seven women suffered actionable sexual harassment

The court holds that a reasonable jury could find that seven allegedly aggrieved persons, Mss. Gwen Allen, Stacy Barager, Denise Roundtree,[8] Jammie Scott,[9] Annette Smith, Rebecca Waisr and Tiani Warden-Thompson,[10] suffered actionable sexual harassment. A reasonable jury could find each of these seven women suffered severe or pervasive sexual harassment. A reasonable jury could also find CRST knew or should have known of the alleged sexual harassment but failed to take proper remedial action with respect to each woman.

Accordingly, the court shall decline to bar the EEOC from pursing relief at trial on behalf of Mss. Allen, Barager, Roundtree, Scott, Smith, Waisr or Warden-Thompson.

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8. Only Mr. Christian Turner's actions are actionable. Mr. Michael Worth did not sexually harass Ms. Roundtree. Mr. Worth only (1) listened to a radio station on which radio personalities used profanity and talked about sex and (2) smelled Ms. Roundtree's pillow.

9. Only Mr. Mike Robertson's actions are actionable. There is no evidence Ms. Scott reported the actions of any other coworkers to CRST.

10. With respect to Ms. Warden-Thompson, there is no evidence CRST knew about her severe or pervasive sexual harassment. At most, a reasonable jury could find CRST should have known about it.

Appendix F

VI. CONCLUSION

The Motion (docket no. 149) is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) The EEOC is **BARRED** from seeking relief at trial on behalf of forty-eight allegedly aggrieved persons: Mss. Kristi Allen, Antoinette Baldwin, Mary Beaton, Natasha Brown, Kathy Cannoles, Linda Connor, Catherine Coronado, Tamara Demery, Dorothy Dockery, Catherine Fletcher, Angelene Gatewood, Sylvia Griffith, DeQuinda Harris, Debra Hindes, Tracy Hughes, Zainabu Jenga, Diane Johnson, Brenda Kennett, Madeline Lovins, Patricia Marzett, Virginia Mason, Lucinda McBlair, Nona McCuien, Rosalyn McDaniels, Leah Meyers-Graham, Darlene Miller, Bonnie Moesch, Sherry O'Donnell, Shirley Parker, Christina Payne, Sheree Phillips, Tammi Pile, Sharon Pinchem, Peggy Pratt, Donna Quigley, Danette Quintanilla, Janet Ranney, Kathleen Seymour, Jonne Shepler, Linda Skaggs, Mary "Emily" Smith, Jennifer Susson, Christine Taylor, Laura Taylor, Laurie Thompson, Robin Timmons, Sharon Wyrick and Betsy Ybarra.

(2) The court declines to bar the EEOC from seeking full relief at trial on behalf of seven allegedly aggrieved persons: Mss. Gwen Allen, Stacy Barager, Denise Roundtree, Jammie Scott, Annette Smith, Rebecca Waisr and Tiani Warden-Thompson.

(3) The EEOC is **ORDERED** to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before July 13, 2009, at 5 p.m.** *See* Order (docket no. 66), *passim.*

IT IS SO ORDERED.

DATED this 9th day of July, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX G — SUMMARY JUDGMENT ORDER ON SEVERE OR PERVASIVE HARASSMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED JULY 6, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

BARBARA GRANT, CINDY MOFFETT, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

ORDER

[TABLE OF CONTENTS INTENTIONALLY OMITTED]

Appendix G

I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s "Motion for Summary Judgment Against Class Members Who Did Not Experience Severe or Pervasive Sexual Harassment" ("Motion") (docket no. 148).

II. RELEVANT PRIOR PROCEEDINGS[1]

On February 13, 2009, Defendant CRST Van Expedited, Inc. ("CRST") filed the Motion. On March 16, 2009, Plaintiff Equal Employment Opportunity Commission ("the EEOC") filed a Resistance (docket no. 164). On March 31, 2009, CRST filed a Reply (docket no. 183).

CRST requests oral argument on the Motion, but the court finds oral argument is not appropriate. *See* LR 7.c. The Motion is fully submitted and ready for decision.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005)

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1. The court assumes complete familiarity with the prior proceedings.

(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g.*, *Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

Appendix G

IV. SUMMARY OF THE RELEVANT LAW

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). "The Supreme Court has determined . . . that sexual harassment 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' qualifies as [unlawful] sex discrimination under Title VII." *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 928 (8th Cir. 2008) (quoting *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). In *Meritor*, the Supreme Court explained:

> The phrase "terms, conditions, or privileges of employment" [within 42 U.S.C. § 2000e-2(a)(1)] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.
>
> * * *
>
> [S]exual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

> Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.
>
> Of course . . . not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.

477 U.S. at 64-67 (citations and internal quotation marks omitted).

To prove sex discrimination based upon a hostile work environment theory of sexual harassment, then, a plaintiff must prove "(1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of employment." *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1194-95 (8th Cir. 2006) (citing *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005)). In addition,

> if the harassment was committed by a co-worker, [a plaintiff] must . . . establish that [the employer] "knew or should have known of the conduct and failed to take proper remedial action." *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 987 (8th Cir. 1999). On the other hand, if the harassment was committed by an employee who supervised [the plaintiff], [the employer] is vicariously liable for the harassment unless it can establish the affirmative defense defined in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

Joens v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004). That is,

> [the employer] is vicariously liable for harassment by its supervisory personnel unless it can establish that (1) [it] exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) [the plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities provided by [the employer]. [*Ellerth*, 524 U.S. at 765]. An employer may assert the affirmative defense only "[w]hen no tangible employment action is taken." [*Faragher*, 524 U.S. at 807-08].

Gordon, 469 F.3d at 1195.[2]

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2. This court has repeatedly held that CRST's trainers and co-drivers were the allegedly aggrieved persons' coworkers and not their supervisors. *See, e.g.*, Order (docket no. 197), at 60-61; Order (docket no. 249), at 17-18 & n.9; Order (docket no. 251), at 3 n.2.

Appendix G

To prove sexual harassment is sufficiently unwelcome to be actionable under Title VII, a plaintiff must meet an objective standard and a subjective standard regarding the harassment itself. With respect to the objective standard, the Supreme Court has made clear over the years that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). With respect to the subjective standard, it is settled that, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris*, 510 U.S. at 21-22.

"Hostile work environment claims are assessed based on the totality of the circumstances." *O'Brien v. Dep't of Agric.*, 532 F.3d 805, 809 (8th Cir. 2008). Relevant factors include but are not limited to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. "[N]o single factor is required." *Id.*

It is imperative to remember, however, that

> [h]ostile work environment claims are limited in nature, requiring a high evidentiary showing that the plaintiff's workplace is "permeated with discriminatory intimidation, ridicule, and

> insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Vajdl v. Mesabi Acad. of KidsPeace, Inc., 484 F.3d 546, 550 (8th Cir. 2007) (quoting *Harris*, 510 U.S. at 21)); *see also Nitsche v. CEO of Osage Valley Elec. Co-op.*, 446 F.3d 841, 846 (8th Cir. 2006) (requiring hostile work environment plaintiffs to "clear a high threshold to demonstrate actionable harm"); *Al-Zubaidy*, 406 F.3d at 1039 (requiring hostile work environment plaintiffs to meet "demanding harassment standards"). "Title VII does not mandate an employment environment worthy of a Victorian salon." *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988). "White gloves, crystal, and fine china are neither required nor expected." *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 662 (D. Minn. 1991). Title VII was not designed to "displace all ribaldry on the roadway," and "[o]ne may well expect that . . . language of the barracks will always predominate over that of the ballroom." *Hall*, 842 F.2d at 1017-18.

V. THE MERITS

A. Outline of Arguments

In the Motion, CRST asks the court to bar the EEOC from seeking relief on behalf of nineteen allegedly aggrieved persons: Mss. Tressie Abbott, Christie Basye, Andrea Cantrell, Deborah Carey, Meredith Carney, Margaret Daniels, Dolores Ferrell, Victoria Holmes, January Jackson, Tillie Jones, Angela Lesmeister,

Faith McDaniel, Patricia Merritt, Debra Moorer, Julie Noernberg, Anya Owens, Isabel Perez, Esther Steanhouse and Tameisha Wilson. CRST argues the EEOC has provided the court with insufficient evidence to prove that these nineteen allegedly aggrieved persons suffered actionable sexual harassment. CRST's primary argument with respect to each of the aggrieved persons is that they did not suffer severe or pervasive sexual harassment.

The EEOC concedes that Mss. Basye, Cantrell, Carney and Ferrell did not suffer severe or pervasive sexual harassment but resists the remainder of the Motion. The EEOC maintains Mss. Abbott, Carey, Daniels, Holmes, Jackson, Jones, Lesmeister, McDaniel, Merritt, Moorer, Noernberg, Owens, Perez, Steanhouse and Wilson suffered actionable sexual harassment.

B. Analysis

The court need not catalogue all of the sordid facts relating to each of the nineteen allegedly aggrieved persons at issue in the Motion. After considering the parties' arguments in conjunction with the voluminous record before the court, the court rules as follows:

1. The EEOC concedes Mss. Basye, Cantrell, Carney and Ferrell did not suffer actionable sexual harassment

On April 30, 2009, the court held that, to the extent the EEOC purported to assert a "pattern or practice claim" in this litigation, such claim must be dismissed. *See* Order

(docket no. 197), *passim*. In light of such ruling, the EEOC concedes that Mss. Basye, Cantrell, Carney and Ferrell did not suffer severe or pervasive sexual harassment. The EEOC writes:

> [The] EEOC contends [Mss. Basye, Cantrell, Carney and Ferrell] suffered harassment and thus their claims should not be dismissed if this court allows the pattern and practice claim to proceed. [The] EEOC, however, concedes that their claims do not meet the severe or pervasive standard if treated as individual claims.

Resistance (docket no. 164), at 5 (footnote omitted).

Accordingly, the court shall bar the EEOC from seeking relief at trial on behalf of Mss. Basye, Cantrell, Carney and Ferrell.[3]

2. A reasonable jury could find that Mss. Carey, Daniels, Lesmeister, Merritt, Moorer, Noernberg, Owens and Wilson suffered actionable sexual harassment

The court holds that a reasonable jury could find

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3. In any event, the EEOC's unwritten premise—that the mere presence of a "pattern or practice claim" would somehow save the "individual claims" of Mss. Basye, Cantrell, Carney and Ferrell—is unsupported and unsound. *See, e.g., id.* at 26-32 (discussing *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997) and the EEOC's flawed proposal for a burden-shifting framework for sexual harassment cases); Order (docket no. 156), at 5-6 (foreclosing the EEOC from seeking "class-wide" punitive damages).

that Mss. Carey, Daniels, Lesmeister, Merritt, Moorer, Noernberg, Owens and Wilson suffered actionable sexual harassment. A reasonable jury could find each woman suffered severe or pervasive sexual harassment. The allegations of Ms. Carey and Ms. Wilson are illustrative.

Ms. Carey worked for CRST as a truck driver from June 21, 2006 to March 28, 2008. She testified in her deposition that, during such time, ten of her fourteen co-drivers sexually harassed her. The sexual harassment included inappropriate sexually charged comments, "a brush here or a feel there," Def.'s App'x at 69, propositions for sexual intercourse and professions of love. One co-driver fondled her while she was sleeping in her bed. And when Ms. Carey refused one co-worker's sexual advances, he booted her off their truck and left her abandoned at a truck stop for a few hours. Ms. Carey complained about some of this conduct early on to no avail. Such evidence is sufficient to survive summary judgment. *See, e.g., Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998) (holding there was sufficient evidence to show the plaintiff suffered actionable sexual harassment, where there was evidence the plaintiff experienced unwanted physical contact and chronic sexual innuendo).

Ms. Tameisha Wilson's sworn allegations are even more disconcerting. Ms. Wilson worked for CRST from December 13, 2006 to March 18, 2007. Ms. Wilson was one of CRST's lead drivers. One of her trainees, Mr. Darryl Lewis, sexually harassed her. Mr. Lewis constantly propositioned Ms. Wilson for sexual intercourse, asked her if he could touch parts of her body, tried to grab her

breasts every night, tried to jump on top of her, tried to burn her with a cigarette, punched her in the jaw and tried to choke her. He called her a "bitch," told her "what happens on the truck stays on the truck," referred to himself as "The Pimp of Memphis," and stated that he knew she wanted him and no one could refuse his sexual advances. Def.'s App'x at 3363. Ms. Wilson repeatedly complained about the sexual harassment to her dispatcher, but her dispatcher refused to help her. Instead, the dispatcher told Ms. Wilson to "try to stick it out." *Id.* CRST's argument that Ms. Wilson did not suffer severe or pervasive sexual harassment is wholly unsupported in fact and law. Indeed, *all* of the aggravating factors in *Harris* are present.

Accordingly, the court shall decline to bar the EEOC from pursing relief at trial on behalf of Mss. Carey, Daniels, Lesmeister, Merritt, Moorer, Noernberg, Owens and Wilson.

3. A reasonable jury could not find that Mss. Abbott, Holmes, Jackson, Jones, McDaniel, Perez or Steanhouse suffered actionable sexual harassment

The court holds that a reasonable jury could not find that Mss. Abbott, Holmes, Jackson, Jones, McDaniel, Perez or Steanhouse suffered actionable sexual harassment. A reasonable jury could not find these women suffered severe or pervasive sexual harassment or, in the case of Ms. Jackson, that CRST "knew or should have known of the [sexual harassment] and failed to take proper remedial action." *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983,

987 (8th Cir. 1999).[4] The allegations of Ms. Abbott, Perez and Steanhouse are illustrative.

Ms. Abbott worked for CRST from December 21, 2006 to February 15, 2007. Ms. Abbott alleges that one of her trainers, Mr. Gene Garrett, sexual harassed her. Ms. Abbott rode with Mr. Garrett from December 22, 2006 until January 5, 2007. The EEOC argues Ms. Abbott was sexually harassed on January 4 or 5, 2007, when Mr. Garrett told her a story. As Ms. Abbott was driving their semi-truck somewhere in Kansas, Mr. Garrett told Ms. Abbott that he had been a juror in a child molestation

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4. Ms. Jackson did not report sexual harassment to CRST until after she left her truck. CRST may not be held liable for sexual harassment it could not stop and that had already ended by the time it was made aware of it. *See, e.g., Anda v. Wickes Furn. Co.*, 517 F.3d 526, 532 (8th Cir. 2008) (affirming dismissal of sexual harassment claim in part because plaintiff failed to fully notify her employer of the harassment and there was no other evidence in the record that tended to show that the employer should have known of the harassment); *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005) (similar); *Whitmore v. O'Connor Mgmt., Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (similar); *Bombaci v. Journal Cmty. Publ'g Group, Inc.*, 482 F.3d 979, 983-84 (7th Cir. 2007) (similar); *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 299-300 (5th Cir. 2001) (similar). Further, the EEOC has not presented the court with evidence that CRST's response to Ms. Jackson's complaint was ineffective per se. *Cf. Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 (7th Cir. 2000); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990); Order (docket no. 251), at 10-13. While the EEOC complains about CRST's inclusion of a "failure to report" argument in the Motion, nothing in the court's prior orders precludes the inclusion of the argument in the Motion. In any event, the court discerns no prejudice to the EEOC.

case. Ms. Abbott repeatedly told Mr. Garrett she did not want to hear his story, but Mr. Garrett persisted for about eight to ten minutes. Mr. Garrett stated:

> [T]he cases that [I] sat in on was [sic] about two little girls, and the dad took the one little girl in and set [sic] her on her bedroom [sic], took all her clothes off and spread her legs and brought the other little girl in and spread her legs and put his hands on both of them.

Def.'s App'x at 8.[5] Ms. Abbott did not believe Mr. Garrett served on a jury. Ms. Abbott testified:

> [I did not believe he served on a jury] [b]ecause he had told me that formerly he had two daughters and he hadn't spoken to them in years because their grandmother had told them if they would stay away from their dad she would send them to college, and I asked him if they had graduated college, and he said he did not know, he had not spoken to them since they were little girls; and in my mind I just thought that those little girls were like me; they got molested.

* * *

5. CRST's eleventh uncontested individual statement of material fact misquotes the deposition transcript. CRST erroneously substituted "put his hands in both of them" in lieu of "put his hands on both of them."

> [J]ust the way he talked about it, it was like he was kind of excited to tell me the story. Maybe that was just in my mind.

Id. at 18. Ms. Abbott "killed the truck" until Mr. Garrett stopped. *Id.* She then restarted the truck and continued driving until they reached their destination in Colorado.

The EEOC concludes this single incident rises to the level of severe or pervasive sexual harassment, because "[Ms.] Abbott was alone on a truck with a man who she had good reason to believe was a child molester who was eager to force his captive audience to hear all the details of what he had done to his children." Resistance (docket no. 164), at 18. Even if the court assumes Ms. Abbott reasonably believed Mr. Garrett was telling her a story about how he sexually molested his own daughters, this single incident clearly does not rise to the level of severe or pervasive sexual harassment. *See, e.g., Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1077 (8th Cir. 2006) (holding that "several instances where [the alleged harasser] talked about her . . . sexual exploits outside the office, described particular fantasies that she harbored concerning co-workers, and propositioned [the plaintiff] for sex" was not sufficiently severe or pervasive to affect a term, condition or privilege of employment); *Hudson v. M.S. Carriers, Inc.*, 335 F. Supp. 2d 853, 856-57 & 862 (W.D. Tenn. 2003) (holding that a plaintiff did not suffer severe or pervasive sexual harassment, where her alleged harasser (1) asked her about her underwear, (2) told her "he went to a strip bar and swiped the stripper's rear end with his credit card," (3) pretended his pencil was

his penis and (4) took off his shoe and touched her with his feet), *aff'd*, 126 F. App'x 297 (6th Cir. 2005). The mere recounting of one ten minute story about one's sexual exploits, no matter how foul, disgusting or even criminal, does not constitute severe or pervasive sexual harassment. The unique nature of CRST's working environment, while certainly a factor that may be considered in the totality of the circumstances, cannot by itself transform a single incident into severe or pervasive sexual harassment.

Ms. Perez has worked for CRST since August of 2008. She alleges her first trainer, Mr. Giles Lopez, sexually harassed her. However, it is undisputed that Mr. Lopez never propositioned Ms. Perez for sexual intercourse and never touched her in a sexual manner. Rather, Ms. Perez complains that she did not get along with Mr. Lopez. Among other things, Mr. Lopez repeatedly swore at Ms. Perez (calling her a "fucking bitch" and a "son of a bitch"), told her she was a bad truck driver, and raised his arm as if to hit her. Mr. Lopez also refused to allow Ms. Perez to use a restroom or shower, because he did not want to stop the truck and delay delivery of their load. The Seventh Circuit Court of Appeals has observed:

> Title VII does proscribe gender-based harassment even when it is not motivated by sexual desire, and it is true that "[c]ourts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct,"

> thereby robbing instances of gender-based harassment of their cumulative effect. However, none of this helps [the plaintiff], because she offers nothing suggesting that the . . . harassment was motivated by her gender . . . . While the cases . . . correctly stress that gender-based harassment need not be overtly sexual and may include ridicule, ostracism, and other forms of hostility motivated by an anti-female animus, they do not hold that hostile behavior by co-workers is actionable as sexual harassment even if it not based on gender.

Berry v. Delta Airlines, Inc., 260 F.3d 803, 810-11 (7th Cir. 2001) (citing in part *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (holding that a plaintiff must show that "but for the fact of her sex, she would not have been the object of harassment")). Even when taken in the light most favorable to the EEOC, there is insufficient evidence in the summary judgment record from which a jury could reasonably find Mr. Lopez's conduct was based on gender as opposed to simply a personality conflict. There is little evidence in the record Mr. Lopez would have treated Ms. Perez any differently were she male.[6] It is at least equally likely that he simply did not like her, and a reasonably jury would have to speculate to conclude that her gender was the root cause of his nasty actions.

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6. There is some evidence Mr. Lopez did not believe a woman could drive better than a man, but it is undisputed that Ms. Perez never reported such a comment to CRST's management.

Appendix G

Ms. Steanhouse worked for CRST from December of 2007 to October of 2008. The EEOC alleges Ms. Steanhouse was subjected to severe or pervasive sexual harassment when, on or about December 14, 2007, Ms. Steanhouse's trainer, Mr. Rodderick Jones, sent her a text message that stated "when he returned from the store he wanted [Ms. Steanhouse] to get in his bed." Def.'s App'x at 3012. Aside from this single text message, Mr. Jones did not do or say anything else to Ms. Steanhouse that could be construed as sexual harassment. At no point did he ever physically contact Ms. Steanhouse in a sexually untoward manner. The EEOC's argument that Ms. Steanhouse suffered severe or pervasive sexual harassment is not well-taken, because it is long-settled that a single proposition for sex is not actionable. *See, e.g., Duncan v. General Motors Corp.*, 300 F.3d 928, 931-35 (8th Cir. 2002) (holding that "a single request for a relationship, which was not repeated when she rebuffed it, four or five isolated incidents of Booth briefly touching her hand, a request to draw a planter, and teasing in the form of a poster and beliefs for an imaginary club" did not constitute actionable sexual harassment).

Accordingly, the court shall bar the EEOC from seeking relief at trial on behalf of Mss. Abbott, Holmes, Jackson, Jones, McDaniel, Perez or Steanhouse.

Appendix G

VI. CONCLUSION

The Motion (docket no. 148) is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) The EEOC is **BARRED** from seeking relief at trial on behalf of eleven allegedly aggrieved persons: Mss. Tressie Abbott, Christie Basye, Andrea Cantrell, Meredith Carney, Dolores Ferrell, Victoria Holmes, January Jackson, Tillie Jones, Faith McDaniel, Isabel Perez and Esther Steanhouse.

(2) The court declines to bar the EEOC from seeking full relief at trial on behalf of eight allegedly aggrieved persons: Mss. Deborah Carey, Margaret Daniels, Angela Lesmeister, Patricia Merritt, Debra Moorer, Julie Noernberg, Anya Owens and Tameisha Wilson.

(3) The EEOC is **ORDERED** to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before July 9, 2009, at 5 p.m.** *See* Order (docket no. 66), *passim*.

IT IS SO ORDERED.

DATED this 6th day of July, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX H — SUMMARY JUDGMENT ORDER ON FAILURE TO REPORT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED JUNE 18, 2009

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

BARBARA GRANT, CINDY MOFFETT, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Intervenors,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

June 18, 2009, Decided
June 18, 2009, Filed

LINDA R. READE, CHIEF JUDGE.

Appendix H

ORDER

[TABLE OF CONTENTS INTENTIONALLY OMITTED]

I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s "Motion for Summary Judgment Based on Class Members' Failure to Report the Alleged Harassment and/or CRST's Prompt and Effective Response to Reported Harassment" ("Motion") (docket no. 146).

II. RELEVANT PRIOR PROCEEDINGS[1]

On February 13, 2009, Defendant CRST Van Expedited, Inc. ("CRST") filed the Motion. On March 16, 2009, Plaintiff Equal Employment Opportunity Commission ("EEOC") filed a Resistance (docket no. 162). On March 31, 2009, CRST filed a Reply (docket nos. 181 & 182).

CRST requests oral argument on the Motion, but the court finds oral argument is not appropriate. *See* LR 7.c. The Motion is fully submitted and ready for decision.

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1. The court assumes complete familiarity with the prior proceedings.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g., Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not

appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

IV. SUMMARY OF THE RELEVANT LAW

Under Title VII, it is generally unlawful for an employer to discriminate against a woman because of her sex. 42 U.S.C. § 2000e-2(a)(1). Sexual harassment in the form of a hostile work environment may constitute unlawful sex discrimination. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

To prove a claim of an actionable hostile work environment by non-supervisory coworkers,[2] a plaintiff must prove five elements. The plaintiff must prove

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2. Again, the court holds that CRST's trainers and co-drivers were the allegedly aggrieved persons' coworkers and not their supervisors. *See, e.g.*, Order (docket no. 197), at 60-61; Order (docket no. 249), at 17-18 & n.9; *see also Morgan v. CRST Van Expedited, Inc.*, No. 05-CV-181-JAJ, 2007 U.S. Dist. LEXIS 7566, 2007 WL 402407, *8 n.4 (N.D. Iowa Feb. 1, 2007) (noting plaintiff conceded that CRST's trainers and co-drivers were coworkers and not supervisors for purposes of Title VII).

> (1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and her protected-group status; (4) the harassment affected a term, condition, or privilege of employment; and (5) her employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

Austin v. Minn. Mining & Mfg. Co., 193 F.3d 992, 993 (8th Cir. 1999); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1178-79 (N.D. Iowa 2000) (Bennett, C.J.).

The fifth element, *i.e.*, that the "employer knew or should have known of the harassment and failed to take prompt and effective remedial action," tethers the employer to the conduct of an arguably rogue employee. This element is a necessary component of the plaintiff's *prima facie* case because

> there is no vicarious liability for co-worker harassment. What applies instead is a negligence standard; that is, an employer will be held liable for an atmosphere of sexual harassment by co-workers only if it knew or should have known of the harassment and failed to act. . . . .

3 Lex K. Larson, *Employment Discrimination* § 46.07[3], at 46-129-30 (2d ed. Oct. 2008).

Whether there is sufficient evidence in the summary judgment record to support the inference that the employer *knew* about the plaintiff's sexual harassment will, of course, depend on the circumstances of each case. *See id.* § 46.07[3], at 46-130 ("[R]esults in each case simply depend on an interpretation of the facts . . . .").

> Actual notice may be found if the employee reported the harassment to the [employer]'s personnel office or equal employment office, to management personnel who are designated in [the employer's] policies as the appropriate recipients of such complaints, to other appropriate management personnel who are authorized to take such complaints, or to the EEOC or relevant state anti[-]discrimination agency. Even if harassment is not reported, the employer may be held to be on notice if an authorized supervisor actually witnessed the harassment. It is also not necessary for a plaintiff to follow the [employer]'s precise reporting procedures for the [employer] to be imputed with notice.

Id. § 46.07[3], at 46-131-32.

Whether a reasonable jury could find the employer *should have known* about the sexual harassment of the plaintiff also depends on the circumstances of each case. *See id.* § 46.07[3], at 46-130. In some cases, "notice may be presumed where the work environment is permeated with pervasive harassment." *Wilson v. Chrysler Corp.*, 172 F.3d 500, 509 (7th Cir. 1999), *abrogated on other*

grounds by Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802-07, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999). For example, notice may be presumed when the plaintiff worked in "a peculiarly communal employment forum" and the sexual harassment occurred "in common areas," "in open view," "in the presence of other employees" and "was public and deliberately exhibitionist." *Id.* Under such circumstances, a reasonable jury could infer management was not "oblivious to such openly hostile behavior." *Id.*; *see, e.g., Franklin v. King Lincoln-Mercury-Suzuki, Inc.*, 51 F. Supp. 2d 661, 666 (D. Md. 1999) (holding a reasonable jury could find the employer had constructive notice of coworker sexual harassment where "virtually all of the alleged acts of sexual harassment[, including a penis measuring contest, verbal abuse and sexually explicit gestures,] took place on the showroom floor of the dealership which, by design, is a distinctively communal employment forum"). Notice may also be presumed if sexual harassment at the employer's plant was general knowledge and management had received prior sexual harassment complaints about the plaintiff's alleged harasser. *Ciszewski v. Engineered Polymers Corp.*, 179 F. Supp. 2d 1072, 1097-98 (D. Minn. 2001).

To show an employer "'failed to take proper remedial action,'" *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (citation omitted), the plaintiff must show the employer did not undertake a course of action "reasonably calculated to stop the harassment," *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999).

Appendix H

> Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment.

Id. (citations omitted). "The promptness and adequacy of an employer's response will often be a question of fact for the factfinder to resolve." *Id.*

"As one might predict, examples of improper employer action abound, ranging from dilatory or inadequate discipline of the offender . . . ." 3 Lex K. Larson, *Employment Discrimination* § 46.07[3], at 46-135 (2d ed. Oct. 2008). Proper "corrective actions may take the form of promptly interviewing the alleged harasser and victim and many potential witnesses, reviewing any documentary or physical evidence and meting out appropriate discipline." *Id.* "Title VII does not necessarily require that an employer fire a harasser." *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 912 (8th Cir. 2006).

V. ANALYSIS

In the Motion, CRST asks the court to bar the EEOC from seeking relief in this case on behalf of thirty-one[3]

3. The Motion only lists twenty-nine allegedly aggrieved persons. As previously indicated, however, the court considers

allegedly aggrieved persons. CRST argues the EEOC has provided the court with insufficient evidence to prove that, with respect to each of the thirty-one allegedly aggrieved persons, CRST both (1) knew or should have known of sexual harassment and (2) failed to take prompt and effective remedial action. In other words, CRST maintains a reasonable jury would be unable to find the fifth elements of each of the sexual harassment "claims" of these thirty-one women to be proved by a preponderance of the evidence. The EEOC resists the Motion in its entirety.

The court need not catalogue for the reader all of the sordid facts relating to each of the thirty-one allegedly aggrieved persons at issue in the Motion. After considering the parties' arguments in conjunction with the voluminous record before the court, the court rules as follows:

A. CRST Did Not Know and Had No Reason to Know About the Sexual Harassment of Eleven Women

First, the court holds that there is insufficient evidence in the summary judgment record to show that CRST knew or should have known that the following eleven women suffered sexual harassment: Mss. Bonnie Batyick, Christine Bell-Boyer, Bethany Broeker, Kim Chisolm, Samantha Cunningham, Denise Desonier, Jeana

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the parties' arguments with respect to Mss. Belinda Bedford and Faith Shadden in conjunction with the Motion. Order (docket no. 223), at 20-22 & 25.

Allen, Delila Katzka, Tina Lott, Vernona McIver and Rachel Tucker. Indeed, Mss. Bell-Boyer, Chisolm, Allen, Katzka, Lott and Tucker *never* informed CRST of the sexual harassment while they were working for CRST. By failing to report their alleged harassment promptly to CRST, these eleven women did not provide CRST with an opportunity to take remedial action reasonably calculated to end their harassment. CRST may not be held liable for sexual harassment it could not stop and that had already ended by the time it was made aware of it. *See, e.g., Anda v. Wickes Furn. Co.*, 517 F.3d 526, 532 (8th Cir. 2008) (affirming dismissal of sexual harassment claim in part because plaintiff failed to fully notify her employer of the harassment and there was no other evidence in the record that tended to show that the employer should have known of the harassment); *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005) (affirming dismissal of coworker sexual harassment claim in part because the plaintiff failed to notify manager of sexual harassment until after the coworker had been reassigned to another jobsite); *Whitmore v. O'Connor Mgmt., Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) ("We believe that in cases not involving vicarious liability, employees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employers can be held responsible for failing to correct that behavior, at least ordinarily."); *Bombaci v. Journal Cmty. Pub'g Group, Inc.*, 482 F.3d 979, 983-84 (7th Cir. 2007) ("A plaintiff alleging co-worker harassment must offer evidence that she notified the employer about the harassment or that the harassment was so pervasive that a jury may infer that the employer knew about it.");

Woods v. Delta Beverage Group, Inc., 274 F.3d 295, 299-300 (5th Cir. 2001) ("Delta Beverage cannot be held liable for conduct of which it had no knowledge. Woods had the obligation to report the alleged harassment to Delta Beverage as she had been instructed. Her failure to do so is fatal to her case.").

For example, Ms. Batyick alleges her trainer, Mr. Phillip Buckner, sexually harassed her. Mr. Buckner trained Ms. Batyick from January 27, 2008 to February 25, 2008. It is undisputed that Ms. Batyick did not report the alleged sexual harassment to management until the day she got off Mr. Buckner's truck. She had numerous opportunities to report the sexual harassment while training under Mr. Buckner but failed to do so. Indeed, on February 23, 2008, Ms. Batyick submitted a driver evaluation to CRST in which she rated Mr. Buckner a "five out of five" in the category of "appearance and actions were professional." Def.'s App'x at 310. At trial, the EEOC would be required to prove that CRST "'knew or should have known of the conduct and failed to take proper remedial action.'" *Joens*, 354 F.3d at 940. The EEOC has failed to generate a genuine issue of material fact as to this element with respect to Ms. Batyick. CRST did not know about Mr. Buckner's conduct until after it ended even though CRST had trained Ms. Batyick to promptly report sexual harassment to management.

Likewise, the record is devoid of any evidence from which a reasonable jury might find CRST should have known Mr. Buckner was sexually harassing Ms. Batyick. There is no evidence CRST had reason to believe Mr.

Buckner may have sexually harassed other women before driving with Ms. Batyick. *Cf. Ciszewski*, 179 F. Supp. 2d at 1097-98. As the court recognized when it dismissed the EEOC's "pattern or practice claim," Order (docket no. 197), *passim*, the EEOC has not presented the court with any expert evidence to support its supposition that male truck drivers are likely to sexually harass their female coworkers due to CRST's "intrinsically coercive" business model. Brief in Support of Resistance (docket no. 168-1), at 4. Finally, CRST does not operate a unified workplace. As a consequence, the court may not simply presume management knew what was happening in the isolated cabs of eleven semi-truck tractors. *Cf. Wilson*, 172 F.3d at 509; *Franklin*, 51 F. Supp. 2d at 666.

Accordingly, the court shall bar the EEOC from seeking relief at trial on behalf of Mss. Batyick, Bell-Boyer, Broeker, Chisolm, Cunningham, Desonier, Allen, Katzka, Lott, McIver and Tucker.

B. CRST Adequately Addressed the Sexual Harassment Complaints of Four Women

Second, the court holds that there is insufficient evidence in the summary judgment record to show that CRST failed to adequately address the sexual harassment complaints of Mss. Maybi Fernandez-Fabre, Ginger Laudermilk, Faith Shadden and Diana Vance. To the extent these four women reported the sexual harassment they suffered to CRST in a timely manner, CRST responded appropriately under the circumstances. Indeed, Ms. Vance expressly refused CRST's attempt to remove her from a bad situation.

Accordingly, the court shall bar the EEOC from seeking relief at trial on behalf of Mss. Fernandez-Fabre, Laudermilk, Shadden[4] and Vance.

C. The EEOC May Seek Full Relief on Behalf of Eight Women at Trial

Third, the court declines to bar the EEOC from seeking anything less than full relief at trial on behalf of eight women: Mss. Belinda Bedford, Mary Bender, Lillie Bingaman, Darleaner Deese, Cynthia Fisk, Robryna Fitch, Pamela Hoffman and Bobbi O'Dell. A reasonable jury could find CRST should have known about the sexual harassment of Mss. Bedford, Fisk and O'Dell, because there is circumstantial evidence to show CRST knew that their harassers had previously sexually harassed other women but CRST did not take reasonable steps to prevent recidivism. *Cf. Ciszewski*, 179 F. Supp. 2d at 1097-98.

For instance, when Ms. Fitch reported sexual harassment to one of CRST's managers, *the manager* then

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4. CRST responded appropriately to Ms. Shadden's complaint of sexual harassment against Mr. Carl Bowling. Although there is no evidence CRST responded appropriately to her complaints about three other men, Ms. Shadden testified all three men were "one-timers pretty much" insofar as they all "hit on [her] once," she told them "no" and "they kind of g[o]t the picture." Def.'s App'x at 2602. The sexual harassment by each of these three men is not actionable because it was not severe or pervasive. *See, e.g., Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003) (holding that a single incident of grabbing a co-worker's buttock with force and later joking about it was not sufficiently severe or pervasive to support a sexual harassment claim).

sexually harassed Ms. Fitch. There is sufficient evidence from which a reasonable jury could find Ms. Binagaman complained about sexual harassment, CRST failed to address her complaint and, as a direct consequence, Ms. Binagaman was sexually assaulted. Further, a reasonable jury could find CRST failed to adequately respond to the sexual harassment complaints made by Mss. Bender, Deese and Hoffman, which resulted in further sexual harassment of them.

Accordingly, the court places no bar upon the EEOC's ability to seek relief on behalf of Mss. Bedford, Bender, Bingaman, Deese, Fisk, Fitch, Hoffman and O'Dell at trial.

D. The EEOC May Seek Partial Relief on Behalf of Eight Women at Trial

Fourth, the court places a partial bar on the EEOC's ability to seek relief at trial on behalf of Mss. Pamela Barlow, Peggy Blake, Donna Dickson, Nicole Edwards, Zelestine Grant, Martha Griffin, Carole Pettit and Rhonda Wellman ("the remaining eight women"). Although there is no evidence to show that CRST knew or should have known about the sexual harassment of the remaining eight women, the EEOC has presented the court with evidence from which a jury could find CRST's response to their complaints of sexual harassment left the eight remaining women worse off and thus does not qualify as "effective remedial action" for purposes of establishing a Title VII sexual harassment claim.[5]

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5. The EEOC does not allege retaliation, and the court's discussion in the remainder of this section should not be construed

Appendix H

"The cases recognize that there are some actions an employer might take in response to a worker's complaint of harassment that will, irrespective of their success in bringing the harassment to a halt, subject the employer to liability." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 (7th Cir. 2000). As Judge Posner has observed, in some circumstances merely separating the complainant from the harasser will cause the employer to incur liability under Title VII.

> *A remedial measure that makes the victim of sexual harassment worse off is ineffective per se.* A transfer that reduces the victim's wage or other remuneration, increases the disamenities of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer's duty of correction.

Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (Posner, J.) (emphasis added); *see also Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("[A] victim of sexual harassment should not have to work in a less desirable location as a result of the employer's remedial plan").

> Negligence of this nature exposes the employer not to liability for what occurred

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as a description of a retaliation claim. *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 n.9 (7th Cir. 2000). The issue is whether the EEOC may prove the eight remaining women suffered harm as a result of CRST's ineffective remedial actions.

> before the employer was put on notice of the harassment, but for the harm that the employer inflicted on the plaintiff as a result of its inappropriate response. Recall that in the usual case of coworker harassment, the employer becomes liable to the employee only when it knows or should know that wrongdoing is afoot and yet fails to take steps reasonably designed to stop it. *See Guess*, 913 F.2d at 465. In that scenario, the employer (provided it exercised due care in hiring the harasser) typically is held to account only for injuries that occur *after* the point at which it is on notice of the harassment—in other words, injuries that the employer could have prevented but did not. Where, however, the employer takes action that puts a stop to the harassment, but in a way that inappropriately forces the plaintiff to bear the costs, it is the plaintiff's loss in pay, her demotion, or the other "disamenities of work" for which she is entitled to compensation.

Hostetler, 218 F.3d at 811 (emphasis in original).

On the record presently before the court, a reasonable jury could conclude that CRST's response to the sexual harassment complaints of the eight remaining women left them worse off. For example, a reasonable jury could find CRST removed the women from the trucks they shared with their harassers, which left the women stranded in distant locations waiting without pay for new assignments

or without provisions for food, shelter or transportation.[6] Although CRST may not be held liable for its employees' sexual harassment of the eight remaining women, it may be held liable for its responses to their complaints of sexual harassment insofar as CRST's responses left them worse off and are thus ineffective per se. *Guess*, 913 F.2d at 465.

Accordingly, the court shall bar the EEOC from seeking relief on behalf of Mss. Barlow, Blake, Dickson, Edwards, Grant, Griffin, Pettit and Wellman for any sexual harassment they suffered while working for CRST. However, the court shall permit the EEOC to seek relief on behalf of these eight remaining women to the extent that CRST's responses to their complaints left them worse off and are thus ineffective per se.

VI. CONCLUSION

The Motion (docket no. 146) is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) The EEOC is **BARRED** from seeking relief at trial on behalf of fifteen women: Mss. Jeana Allen, Bonnie Batyick, Christine Bell-Boyer, Bethany Broeker, Kim Chisolm, Samantha Cunningham, Denise Desonier, Maybi Fernandez-Fabre, Delila Katzka, Ginger Laudermilk, Tina Lott, Vernona McIver, Faith Shadden, Rachel Tucker and Diana Vance.

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6. Indeed, some women were left in worse positions than their alleged harassers, who continued to drive the trucks.

(2) The EEOC is **PARTIALLY BARRED** from seeking relief at trial on behalf of Mss. Pamela Barlow, Peggy Blake, Donna Dickson, Nicole Edwards, Zelestine Grant, Martha Griffin, Carole Pettit and Rhonda Wellman. The EEOC may not hold CRST to account for the sexual harassment these eight women suffered; CRST is only potentially liable for any losses these eight women suffered as a direct result of a negligent response to their sexual harassment complaints.

(3) The court declines to bar the EEOC from seeking full relief at trial on behalf of Mss. Belinda Bedford, Mary Bender, Lillie Bingaman, Darleaner Deese, Cynthia Fisk, Robryna Fitch, Pamela Hoffman and Bobbi O'Dell.

(4) The EEOC is **ORDERED** to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before June 22, 2009, at 5 p.m.** *See* Order (docket no. 66), *passim*.

IT IS SO ORDERED.

DATED this 18th day of June, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX I — SUMMARY JUDGMENT ORDER ON CLAIMS OF CERTAIN INTERVENERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED JUNE 2, 2009

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

June 2, 2009, Decided
June 2, 2009, Filed

Appendix I

JUDGES: LINDA R. READE, U.S. DISTRICT COURT CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

[TABLE OF CONTENTS INTENTIONALLY OMITTED]

I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s "Motion for Summary Judgment Against the Claims of Certain of the Interveners" ("Motion") (docket no. 145).

II. RELEVANT PRIOR PROCEEDINGS[1]

A. Ms. Starke's Charge

On December 1, 2005, Ms. Monika Starke presented a Charge of Discrimination ("Charge") to Plaintiff Equal Employment Opportunity Commission ("EEOC"). Ms. Starke alleged that her employer, Defendant CRST Van Expedited, Inc. ("CRST"), "discriminated against [her] on the basis of . . . sex . . . , in violation of Title VII of the

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1. The court assumes complete familiarity with the prior proceedings.

Civil Rights Act of 1964, [42 U.S.C. § 2000e *et seq.*,] as amended" ("Title VII"). Def.'s App'x at 2998. Ms. Starke alleged the following "particulars" in her Charge:

> I was hired by [CRST] on June 22, 2005 in the position of Truck Driver. Since my employment began with [CRST,] I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. . . . . On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

Id. Further, Ms. Starke alleged that CRST "did not state why I was subjected to sexual harassment[,] which created a hostile work environment." *Id.*

Ms. Starke asked the EEOC to file her Charge and cross-file it with the Iowa Civil Rights Commission ("ICRC"). Pursuant to a work-sharing agreement,[2] the EEOC received the Charge on behalf of both agencies and deemed the Charge to be "initially instituted" with the

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2. For further explanation of the work-sharing agreement between the EEOC and the ICRC, see *Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 985-86 (N.D. Iowa 2003) (Bennett, C.J.).

ICRC. (In the work-sharing agreement, the EEOC and ICRC reciprocally designated each other as agents for receiving charges of unlawful employment practices.) The EEOC sent a copy of the Charge to the ICRC, notified the ICRC that the Charge "is to be initially investigated by the EEOC," *id.* at 3000, and began its investigation. The ICRC had waived its right to exclusive jurisdiction over charges initially instituted with it. Here, the ICRC filed the Charge on December 5, 2005 but apparently stayed its own investigation pending resolution of the EEOC proceedings.

The Charge remained pending before the EEOC for nearly two years. During such time, Ms. Starke did not exercise her right to file a Title VII lawsuit against CRST. *See* 42 U.S.C. § 2000e-5(f)(1) (permitting a charging party to file an individual Title VII lawsuit 180 days after her charge is filed); *see, e.g., Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 366, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) (explaining that § 2000e-5(f)(1) provides "[a]n aggrieved person unwilling to await the conclusion of extended EEOC proceedings [the right to] institute a private lawsuit 180 days after a charge has been filed").

B. The EEOC's Complaint

On September 27, 2007, the EEOC filed the instant lawsuit on behalf of Ms. Starke "and a class of similarly situated female employees of [CRST] . . . ." Complaint (docket no. 2), at 1. Pursuant to 42 U.S.C. § 2000e-5(f)(1) and (3) and 42 U.S.C. § 1981a, the EEOC brings suit in its own name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate

relief to [Ms.] Starke and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint (docket no. 8), at 1.[3] The EEOC generally alleges that Ms. Starke and the other similarly situated women ("aggrieved persons" in Title VII parlance[4]) "were adversely affected . . . when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them . . . ." *Id.* At present, the EEOC seeks monetary and equitable relief on behalf of 142 allegedly aggrieved persons. Notice (docket no. 237), at 1-5.

C. Answer

On November 30, 2007, CRST filed an Answer and Affirmative Defenses (docket no. 11). On May 1, 2008, CRST filed an Amended Answer and Affirmative Defenses ("Amended Answer") (docket no. 36) to assert an additional affirmative defense. CRST denies the substance of the EEOC's Complaint and asserts seven affirmative defenses, including waiver or release, failure to exhaust administrative remedies and "untimel[iness]." Amended Answer at 2.

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3. The First Amended Complaint, filed on November 16, 2007, corrected a typographical error in the Complaint. Ruling (docket no. 31), at 1 n.1.

4. Once again, the court refers to the "similarly situated female employees" who are referenced in the EEOC's Complaint as "allegedly aggrieved persons" and not as "class members." Order (docket no. 223), at 5-6.

D. First Intervener Complaint

On August 18, 2008, Ms. Starke and five other women, Mss. Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples and Latesha Thomas, filed a Motion for Leave to Intervene ("First Motion to Intervene") (docket no. 43). They asked the court for permission to intervene in this lawsuit, pursuant to Federal Rule of Civil Procedure 24 and 42 U.S.C. §§ 2000e-5(f)(1) and 2000e-7. Their proposed Complaint ("First Intervener Complaint") (docket no. 49) is substantially similar to the EEOC's Complaint except for three additions.

First, Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas each plead violations of the Iowa Civil Rights Act ("ICRA"), Iowa Code chapter 216 (2007), in addition to violations of Title VII. Second, they plead retaliation claims in addition to claims of sexual harassment, all in violation of Title VII and ICRA. *See, e.g.*, First Intervener Complaint (docket no. 43-3), at 4 ("The retaliation including [sic] among other things, stranding the Plaintiffs/ Interveners, giving them unfavorable assignments, and terminating their employment, such that [CRST]'s conduct had a tendency to dissuaded [sic] a reasonable worker from making or supporting a charge of discrimination."). Third, Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas seek attorneys' fees from CRST.

On September 2, 2008, CRST filed a Resistance (docket no. 46) to the First Motion to Intervene. CRST argued the First Motion to Intervene was untimely because it was filed three months after the court's deadline for adding

parties or amending the pleadings. In the alternative, CRST argued that the First Intervener Complaint failed to establish the rights of Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas to sue under ICRA. CRST noted the six women had not pled compliance with or exhaustion of ICRA's administrative requirements. CRST also questioned their standing to sue under ICRA, because apparently only Ms. Boot resides in Iowa.

On September 11, 2008, Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas filed a Reply (docket no. 47), to which they attached right-to-sue letters from the ICRC for Mss. Starke, Grant, Moffett, Peeples and Thomas (but not Ms. Boot). All five right-to-sue letters are undated. Each letter states without explanation that the woman under consideration had filed a timely charge with the ICRC. *See* Iowa Code § 216.15(12) ("Except as provided in [§] 614.8, a claim under this chapter shall not be maintained unless a complaint is filed with the commission within three hundred days after the alleged discriminatory or unfair practice occurred."). The right-to-sue letters for Mss. Starke and Peeples state they might file a civil action against CRST within 90 days of August 19, 2008. The right-to-sue letters for Mss. Grant, Moffett and Thomas state they might file a civil action against CRST within 90 days of September 11, 2008.

Appendix I

On September 26, 2008, United States Magistrate Judge Jon S. Scoles granted the First Motion to Intervene. Judge Scoles construed § 2000e-5(f)(1) to afford Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas the right to intervene in this action. *See* 42 U.S.C. § 2000e-5(f)(1) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC] . . . ."). Judge Scoles held the First Motion to Intervene was timely under Rule 24 even though Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas "did not offer a convincing reason for their delay in attempting to join this action . . . ." Order (docket no. 48), at 5.[5] Judge Scoles pointed out it was unclear from the record whether Mss. Starke, Boot, Grant, Moffett, Peeples and Thomas had established their rights to sue under ICRA. Instead of denying the First Motion to Intervene on grounds of futility, however, Judge Scoles granted the Motion to Intervene and urged CRST to "file an appropriate motion in that regard." *Id.* at 7.

CRST did not appeal Judge Scoles's decision. Rather, on October 20, 2008, CRST filed an Answer (docket no. 50) to the First Intervener Complaint. CRST denied the substance of the First Intervener Complaint and asserted ten affirmative defenses, including the affirmative defenses it advanced in its Amended Answer.

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5. Judge Scoles later noted that Ms. Starke's attorneys, who also represent Mss. Boot, Grant, Moffett, Peeples and Thomas, "apparently [had] monitored the litigation from the outset." Order (docket no. 124), at 3 n.2.

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E. Second Intervener Complaint

On November 26, 2008, Ms. Nicole Cinquemano filed a Motion for Leave to Intervene ("Second Motion to Intervene") (docket no. 76). Ms. Cinquemano's proposed Complaint ("Second Intervener Complaint") (docket no. 83) was nearly identical to the First Intervener Complaint. Ms. Cinquemano alleges sex discrimination and retaliation in violation of Title VII and ICRA. Specifically, Ms. Cinquemano alleges she "was subjected to . . . unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from her lead driver" and was "threatened with losing her license, and ultimately losing her job, such that [CRST]'s conduct had a tendency to dissuade a reasonable worker from making or supporting a charge of discrimination." Second Intervener Complaint at 3. Ms. Cinquemano asserted the Second Motion to Intervene was timely "[b]ecause [CRST]'s unlawful employment practices continues [sic] until just a few months ago with respect to Ms. Cinquemano, and because a right to sue letter was just obtained . . . ." Brief in Support of Second Motion to Intervene (docket no. 76-2), at 1. Ms. Cinquemano pointed out she had been "an identified class member for some time, and allowing her to intervene [would] in no way unfairly prejudice [CRST]." *Id.* at 2.

On December 4, 2008, CRST filed a Resistance (docket no. 81) to the Second Motion to Intervene. CRST reasserted the arguments in its resistance to the First Motion to Intervene. Further, CRST pointed out Ms. Cinquemano filed the Second Motion to Intervene "just six

weeks before the January 15, 2009 discovery cut-off date and without any justification for this last-minute attempt to intervene." Resistance (docket no. 81), at 1.

On December 8, 2008, Judge Scoles granted the Second Motion to Intervene "[f]or the reasons stated by the Court in its earlier [Order (docket no. 48)]." Order (docket no. 82), at 1. Again, CRST did not appeal Judge Scoles's decision to the undersigned. On January 9, 2009, CRST filed an Answer (docket no. 105) to the Second Intervener Complaint, in which it denies the substance of the Second Intervener Complaint and advances ten affirmative defenses, including the affirmative defenses it advances in its Amended Answer.

F. Amended Intervener Complaints

On May 22, 2009, Ms. Cinquemano filed an Amended Complaint (docket no. 240). On the same date, Mss. Boot, Grant, Moffett, Peeples and Thomas filed an Amended Complaint (docket no. 241). These amended pleadings reflect that, on May 14, 2009, the EEOC issued right-to-sue letters to Mss. Cinquemano, Grant, Moffett and Thomas (but not Ms. Boot or Ms. Starke).[6]

G. Motion

On February 13, 2009, CRST filed the Motion. On March 16, 2009, Plaintiffs-Interveners Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne

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6. The EEOC issued the right-to-sue letters less than a month before trial is scheduled to commence. At present, the significance of the right-to-sue letters is unclear.

Peeples, Monika Starke, Latesha Thomas and Nicole Ann Cinquemano (collectively, "Plaintiffs-Interveners") filed a Resistance (docket no. 161). On March 31, 2009, CRST filed a Reply (docket nos. 181 & 182). The EEOC did not respond to the Motion, even though it claims an attorney-client relationship with Plaintiffs-Interveners and intends to seek relief on their behalf at trial (to the extent that the court has not already barred it from doing so).

CRST requests oral argument on the Motion, but the court finds oral argument is not appropriate. *See* LR 7(c). The Motion is fully submitted and ready for decision.

III. SUMMARY OF THE RELEVANT LAW

A. Unlawful Sex Discrimination--Sexual Harassment

Under Title VII and ICRA, it is generally unlawful for an employer to discriminate against a woman because of her sex. 42 U.S.C. § 2000e-2(a)(1); Iowa Code § 216.6(1)(a). It is settled that sexual harassment in the form of a hostile work environment may constitute unlawful sex discrimination under either statute. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (Title VII); *Reed v. Cedar County*, 474 F. Supp. 2d 1045, 1061 (N.D. Iowa 2007) (Title VII and ICRA).[7]

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7. The court collapses the Title VII and ICRA analyses in the instant Order. *See Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1147 (8th Cir. 2008) ("In most respects, Iowa courts have used the analytical framework used for Title VII claims, and have looked to federal law for guidance, in deciding cases under

Appendix I

To prove sex discrimination based upon a hostile work environment theory of sexual harassment, a plaintiff must prove "(1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of employment." *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1194-95 (8th Cir. 2006) (citing *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005)). In addition,

> if the harassment was committed by a co-worker, [a plaintiff] must . . . establish that [the employer] "knew or should have known of the conduct and failed to take proper remedial action." *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 987 (8th Cir. 1999). On the other hand, if the harassment was committed by an employee who supervised [the plaintiff], [the employer] is vicariously liable for the harassment unless it can establish the affirmative defense defined in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

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the ICRA because the ICRA is modeled in part on Title VII."); *see, e.g., Farmland Foods, Inc. v. Dbq. Human Rights Comm'n*, 672 N.W.2d 733, 743-45 & n.2 (Iowa 2003) (adopting the Title VII framework for hostile work environment racial discrimination claims brought under ICRA). Although the Iowa Supreme Court repeatedly has indicated that the Title VII and ICRA analyses may diverge, *see, e.g., McElroy v. State*, 703 N.W.2d 385, 391 (Iowa 2005), neither party argues for divergent analyses in this case.

Joens v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004). That is,

> [the employer] is vicariously liable for harassment by its supervisory personnel unless it can establish that (1) [it] exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) [the plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities provided by [the employer]. [*Ellerth*, 524 U.S. at 765]. An employer may assert the affirmative defense only "[w]hen no tangible employment action is taken." [*Faragher*, 524 U.S. at 807-08].

Gordon, 469 F.3d at 1195.

To prove sexual harassment is sufficiently unwelcome to be actionable under Title VII or ICRA, a plaintiff must meet an objective standard and a subjective standard. With respect to the objective standard, "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). "[W]hether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances," including the frequency, physicality and severity of the conduct. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam) (citations and internal quotation marks omitted). With respect to the subjective standard, it is settled that, "if the victim does not subjectively perceive the environment to be abusive,

the conduct has not actually altered the conditions of the victim's employment, and there is no [sex discrimination]." *Harris*, 510 U.S. at 21-22.

It is important to remember that neither Title VII nor ICRA "mandate[s] an employment environment worthy of a Victorian salon." *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988). "White gloves, crystal, and fine china are neither required nor expected." *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 662 (D. Minn. 1991). Title VII and ICRA were not designed to "displace all ribaldry on the roadway," and "[o]ne may well expect that . . . language of the barracks will always predominate over that of the ballroom." *Hall*, 842 F.2d at 1017-18.

B. Unlawful Retaliation

In addition to proscribing sexual harassment in the workplace, Title VII and ICRA prohibit retaliation against employees who allege--or participate in an investigation or proceeding alleging--a violation of Title VII or ICRA by their employers. Title VII makes it unlawful for an employer to discriminate against an employee for "oppos[ing] any practice made unlawful by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). ICRA makes it illegal for an employer "to discriminate or retaliate against another person in any of the rights protected [under ICRA] because such person has lawfully opposed any practice forbidden under [ICRA], obeys [ICRA], or has filed a complaint, testified, or assisted in any proceeding under [ICRA]." Iowa Code § 216.11.

Absent direct evidence of retaliation, a plaintiff's claim is analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Barker v. Mo. Dep't of Corr.*, 513 F.3d 831, 834 (8th Cir. 2008); *see also Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006) ("An employee can prove retaliation through circumstantial evidence using the *McDonnell Douglas* burden-shifting analysis." (Citations omitted.)). "Under this framework, the plaintiff has the initial burden of establishing a prima facie case of retaliation." *Barker*, 513 F.3d at 834 (citing *Clark v. Johanns*, 460 F.3d 1064, 1067 (8th Cir. 2006)). To establish a prima facie case of retaliation, the plaintiff must prove "(1) [she] engaged in a protected activity; (2) an adverse employment action was taken against [her]; and (3) a causal connection exists between the two." *Id.* (citing *Thompson v. Bi-State Dev. Agency*, 463 F.3d 821, 826 (8th Cir. 2006)). The plaintiff's burden at the prima facie case stage of the analysis is not onerous, and "[a] minimal evidentiary showing will satisfy this burden of production." *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 850 (8th Cir. 2005) (quoting *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1007 (8th Cir. 2005)). "Once the plaintiff satisfies this burden, [the] defendant must offer a legitimate, non-discriminatory reason for the employment action." *Barker*, 513 F.3d at 834. "The burden of production then returns to the plaintiff to show that the employer's reason was a pretext for discrimination." *Id.*

"The ultimate burden of proof or persuasion to show that the employer's conduct was motivated by retaliatory intent remains at all times on the plaintiff." *Wallace v. DTG Opers., Inc.*, 442 F.3d 1112, 1119 (8th Cir. 2006) (citing

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). "The ultimate question in any retaliation case is whether the employer's adverse action against the employee was motivated by retaliatory intent." *Id.* To establish a retaliation claim, a plaintiff need not succeed on an underlying harassment claim. *Gilooly v. Mo. Dept. of Health & Senior Servs.*, 421 F.3d 734, 739 (8th Cir. 2005) (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)). "A plaintiff need not establish the conduct which she opposed was in fact discriminatory but rather must demonstrate a good faith, reasonable belief that the underlying challenged conduct violated the law." *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000).

C. Standard for Summary Judgment

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g., Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

IV. THE MERITS OF THE CLAIMS OF THE PLAINTIFFS-INTERVENERS

CRST asks the court to dismiss the claims of Mss. Boot, Cinquemano, Grant, Peeples, Starke and Thomas. (CRST does not ask the court to dismiss Ms. Moffett's claims.) The court considers CRST's arguments with respect to each these six women, in turn.

Appendix I

A. Ms. Boot

1. Facts

Ms. Janet Boot f/k/a Mrs. Janet Nibeck-Peck resides in Iowa City, Iowa. She worked as a truck driver for CRST from April of 1997 to January of 1998. Ms. Boot has spina bifida and uses a urine collection system bag. The urine bag gets dirty and is not easy to remove.

Ms. Boot alleges one of her trainers, Mr. Gerald Holmes, sexually harassed her in May or June of 1997 while they were driving a CRST semi-truck in Nevada. According to Ms. Boot:

> I opened up the curtains one night to tell him that I had to go to the rest room, and I did not see his penis, but his hand was going up and down and there was white sperm that got all over the steering wheel. It was due to be my term to drive, but I wasn't going to drive, not with that all over the steering wheel.

Def.'s App'x at 464. Ms. Boot claims she "froze . . . just a few seconds," "closed the curtain" and returned to her bunk in the back of the semi-truck's cab. *Id.* This masturbation incident shocked Ms. Boot and caused her to start shaking.

When Ms. Boot and Mr. Holmes arrived at a fuel stop about two hours down the road from the masturbation incident, Ms. Boot called her dispatcher. Ms. Boot told

her dispatcher: "I [can]not be on that truck anymore and I [am] getting off of it." *Id.* at 465. Ms. Boot did not tell her dispatcher or any other members of CRST management about the masturbation incident. Ms. Boot's dispatcher nonetheless honored Ms. Boot's request to leave the semi-truck, reserved a hotel room for Ms. Boot for the night and assigned Ms. Boot a new trainer in less than twenty-four hours. Ms. Boot later successfully completed her training with a different driver, and CRST eventually promoted her to co-driver status.

On January 16, 1998, CRST randomly tested Ms. Boot for narcotic drugs. Ms. Boot told CRST that she needed to take the test at the University of Iowa with a clean urine bag. CRST denied her request, and Ms. Boot tested positive for THC.[8] Ms. Boot later took a second test with a clean urine bag and tested negative for controlled substances.

On July 8, 1998, CRST terminated Ms. Boot's employment because she failed the first drug test. On September 11, 1998, Ms. Boot filed a charge of discrimination with the EEOC and the Wisconsin Equal Rights Division. On November 23, 1998, the EEOC issued Ms. Boot a right-to-sue letter. However, it does not appear Ms. Boot filed a Title VII or state civil rights lawsuit against CRST.

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8. THC, or tetrahydrocannabinols, is a Schedule I controlled substance and tends to show Ms. Boot smoked marijuana. *See United States v. White Plume*, 447 F.3d 1067, 1070 (8th Cir. 2006) (discussing 21 U.S.C. § 841 *et seq.*).

On January 21, 2000, Ms. Boot filed a lawsuit against CRST and others in the Iowa District Court in and for Linn County. She pressed several common law claims, including negligence, defamation and breach of fiduciary duty.

On December 14, 2001, Ms. Boot and CRST entered into a confidential settlement agreement. In exchange for $3,000, Ms. Boot agreed to dismiss her lawsuit and release CRST from "any and all other existing or potential claims between them involving her employment with CRST," *id.* at 3414, including but not limited to claims under Title VII and ICRA. On January 22, 2002, Ms. Boot dismissed her lawsuit.

2. Argument

CRST offers six independent reasons why the court should dismiss Ms. Boot from this lawsuit with prejudice. CRST points out that (1) Ms. Boot's Title VII claims are untimely, because she alleges she was sexually harassed in 1997; (2) Ms. Boot's ICRA claims are untimely, because she never filed a charge of discrimination with the ICRC; (3) all of Ms. Boot's claims are barred under the express terms of the 2001 settlement agreement; (4) Ms. Boot did not suffer severe or pervasive sexual harassment, because the masturbation incident, while vulgar, was not directed at her or at her gender; (5) Ms. Boot never reported sexual harassment to anyone at CRST; and (6) there is no basis for any retaliation claim, because CRST fired Ms. Boot for failing a random drug test eight months after the alleged sexual harassment occurred.

Ms. Boot concedes her "individual federal and state claims are not timely and that the [s]ettlement [a]greement with CRST precludes her individual claims as well." Resistance (docket no. 161), at 28. She also concedes she "does not have a retaliation claim as such a claim is both untimely and covered by [the parties' settlement agreement.]" *Id.* at 42. Instead, Ms. Boot proffers a largely incoherent argument as to why the court should not dismiss her from this lawsuit. Without citing any legal authority, Ms. Boot contends she is "not precluded from receiving monetary relief as a class member being part of the EEOC's pattern and practice claim because CRST maintained a companywide pattern or practice of sexual discrimination that dated back to when [Ms. Boot] was retaliated against, and because the EEOC is not bound by the Settlement Agreement and Release." *Id.* at 28.

3. Analysis

Ms. Boot's claims are frivolous. As Ms. Boot concedes in her Resistance, her Title VII and ICRA claims are untimely or unexhausted and, in any event, barred under the terms of the settlement agreement. Even if the court were to assume that the settlement agreement does not estop the EEOC from seeking monetary relief on Ms. Boot's behalf in this action, the EEOC did not resist the Motion. In any event, the court has already held in prior orders that (1) CRST did not engage in a pattern or practice of sexual harassment, *see* Order (docket no. 197), *passim*, and (2) the EEOC is not immune from § 2000e-5's statute of limitations and thus may not seek relief for sexual harassment alleged to have occurred prior

to February 4, 2005, *i.e.*, more than 300 days prior to the filing of Ms. Starke's Charge on December 1, 2005, *see* Order (docket no. 223), *passim*. And even if these prior procedural rulings did not completely undercut Ms. Boot's argument, her sexual harassment claims would still fail on their merits. There is no evidence that Ms. Boot reported the masturbation incident to CRST before she was fired. *See, e.g., Anda v. Wickes Furn. Co.*, 517 F.3d 526, 533-34 (8th Cir. 2008) (dismissing hostile work environment sexual harassment claim on a number of alternative bases, in part because "the record is void of any evidence that Anda reported the alleged incidents of sexual harassment . . . before she resigned"). Because Mr. Holmes was Ms. Boot's coworker and not her supervisor, *see* Order (docket no. 197), at 60-61,[9] at trial she would be required to prove

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9. "'The burden of proof to show that [the harasser] was the plaintiff's supervisor lies with the plaintiff.'" *Sicalides v. Pathmark Stores, Inc.*, No. Civ. A. 99-CV-3465, 2000 U.S. Dist. LEXIS 8051, 2000 WL 760439, *7 n.6 (E.D. Pa. Jun. 12, 2000) (quoting *Kent v. Henderson*, 77 F. Supp. 2d 628, 633 (E.D. Pa. 1999)). Other courts have uniformly held that truck driver trainers are coworkers and not supervisors. *See, e.g., Huffman v. New Prime, Inc.*, No. 01-CV-S-0DS-ECF, 2003 U.S. Dist. LEXIS 26204, 2003 WL 24009006, *5 (W.D. Mo. Dec. 17, 2003) (adhering to prior ruling that "truck driver trainers were co-workers rather than supervisors"); *Vernarsky v. Covenant Transp., Inc.*, No. 1:01-CV-305, 2003 U.S. Dist. LEXIS 18330, 2003 WL 21212776, *5 (E.D. Tenn. Apr. 15, 2003) (holding trainers of new truck drivers were not supervisors for purposes of Title VII); *see also Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 850-51 (8th Cir. 2005) (holding foreman was not supervisor for purposes of Title VII because it was undisputed the foreman could not hire, fire, promote or reassign the plaintiff; it was irrelevant that the

that CRST "'knew or should have known of the conduct and failed to take proper remedial action.'" *Joens*, 354 F.3d at 940 (quoting *Dhyne*, 184 F.3d at 987). She has failed to generate a genuine issue of material fact on this element of her sex discrimination claims. Ms. Boot's retaliation claims fail on their merits, because CRST clearly fired her for her positive drug test; there is no other reasonable explanation for CRST's adverse employment action. Simply put, a reasonable jury could not find pretext here.

Accordingly, the court shall dismiss Ms. Boot from this lawsuit with prejudice.

B. Ms. Cinquemano

1. Facts

Ms. Nicole Cinquemano worked for CRST as a contract driver from December of 2007 to April of 2008. Prior to her employment, CRST paid Ms. Cinquemano's tuition to the "Show Me the Road Truck Driving School" in Sikeston, Missouri. Def. App'x at 692. In exchange, Ms. Cinquemano promised to work for CRST for at least eight months.

At the outset of her employment with CRST, Ms. Cinquemano attended orientation in Cedar Rapids, Iowa. The orientation included anti-sexual harassment training.

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plaintiff's supervisor may have consulted with the foreman on such matters and the plaintiff may have believed the foreman was her supervisor).

Ms. Cinquemano read CRST's anti-sexual harassment policy and understood she should contact her fleet manager immediately in the event she was sexually harassed. She also signed a written pledge to follow the policy.

During her orientation, Ms. Cinquemano informed a member of CRST's Safety Department that someone had sexually abused her for three years when she was a child. Ms. Cinquemano told the member of the Safety Department that she had concerns about training under anyone other than her husband, Mr. Michael Cinquemano. (Mr. Cinquemano was one of CRST's fully trained co-drivers.). The member of the Safety Department told Ms. Cinquemano he would try to pair her with her husband.

At the conclusion of her orientation, however, CRST declined to allow Ms. Cinquemano to train under Mr. Cinquemano. Mr. Cinquemano had a poor driving record; he had "got[ten] stuck in the mud twice." Pl.'s App'x at 15. Ms. Cinquemano was agitated that CRST did not assign her to train under her husband, because the opportunity to work with her husband was "the reason why [she] actually joined CRST." Def.'s App'x at 669.

One of CRST's managers asked Ms. Cinquemano if there was anyone else with whom she would be comfortable driving. Ms. Cinquemano suggested Mr. Randy Moore, Mr. Cinquemano's former trainer. The two men had known each other for almost three years and had gotten along well.

Mr. Cinquemano approached Mr. Moore "man to man" and asked him to train his wife. Pl.'s App. at 15.

Mr. Cinquemano told Mr. Moore about Ms. Cinquemano's history of sexual abuse and asked Mr. Moore to take special care of Ms. Cinquemano. Mr. Moore swore to Mr. Cinquemano that he would take good care of his wife.

CRST assigned Mr. Moore to train Ms. Cinquemano, but Mr. Moore betrayed the Cinquemanos' trust. Ms. Cinquemano trained under Mr. Moore from December 16 through 19, 2007. They drove from Cedar Rapids to Salt Lake City, Utah, and then to Carlisle, Pennsylvania. At one point, Mr. Moore told Ms. Cinquemano: "Here comes another truck. Lift up your shirt and then show him your . . . boobs." Def.'s App'x at 663. Ms. Cinquemano refused. While they were driving in Ohio on the way from Utah to Pennsylvania, Mr. Moore asked Mr. Cinquemano to "go down on him . . . while [he] was driving." *Id.* at 663-64. Mr. Moore also "peeped on" Ms. Cinquemano and touched her inappropriately. Pl.'s App'x. at 145.[10] While they drove

10. In her charge of discrimination, filed four months before her deposition, Ms. Cinquemano swore that Mr. Moore peeped on her and touched her inappropriately. Ms. Cinquemano did not mention any peeping and touching in her subsequent deposition, however; to the contrary, Ms. Cinquemano repeatedly testified that the sexual harassment was limited to Mr. Moore's requests for her to expose her breasts and perform fellatio. Without citing any legal authority and notwithstanding its failure to cross-examine Ms. Cinquemano as to this discrepancy, CRST argues Ms. Cinquemano's charge is inadmissible in light of her subsequent deposition testimony. The court assumes without deciding that Ms. Cinquemano's statements in her charge are admissible. *Compare Tippens v. Celotex Corp.*, 805 F.2d 949, 954 n.6 (11th Cir. 1986) (avoiding issue of whether to extend the sham affidavit rule to affidavits filed before depositions but remarking that "it is much

together, Mr. Moore was constantly on his cell phone "talking . . . dirty stuff." Def.'s App'x at 664.

Mr. Moore tried to intimidate Ms. Cinquemano into keeping silent about his conduct. Mr. Moore told Ms. Cinquemano that he had a military background and "was trained on how to kill people." Pl.'s App'x at 33. Mr. Moore told Ms. Cinquemano that, if she reported him to CRST, he would know "how to get [her] back," *id.*, and her "training license would be gone," *id.* at 145. Further, Mr. Moore said "he knew where to find [her], and by turning him in [Ms. Cinquemano] would be taking food out of his kid's mouth." *Id.* Against CRST regulations, Mr. Moore kept a knife on their semi-truck.

Mr. Moore also became verbally abusive toward Ms. Cinquemano. While descending "the Rocky Mountain [sic]" en route to Utah from Iowa, Ms. Cinquemano began "yelling" for Mr. Moore to come out of his bunk. Def.'s App'x at 680. The semi-truck's brakes were failing, and she was speeding out of control. Ms. Cinquemano begged

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less likely that an affidavit which precedes a weak deposition is filed as a transparent sham") *and Couden v. Duffey*, 533 F. Supp. 2d 490, 505 (D. Del. 2008) (declining to invoke sham affidavit doctrine where affidavit preceded deposition when the defendant failed to cross-examine the deponent about contradictions), *with In re CitX Corp., Inc.*, 448 F.3d 672, 680 (3d Cir. 2006) (affirming district court's decision to exclude prior filed affidavit at summary judgement stage, because there is "no principle that cabins sham affidavits to a particular sequence") *and Tippens v. Celotex Corp.*, 815 F.2d 66, 68-69 & n.2 (Hill, J., dissenting from denial of reh'g en banc) (similar).

Mr. Moore to help her. Mr. Moore responded: "Just drive the fuckin' truck. You know how to drive a fuckin' truck. Just drive it. Why can't I get some damn fuckin' sleep around here." *Id.* at 680-81.

Ms. Cinquemano did not complain about Mr. Moore's conduct to CRST while the two were driving together. She did not get off the truck on account of any sexual harassment. Rather, on December 19, 2007, Mr. Moore dropped Ms. Cinquemano off at the Rodeway Inn in Carlisle, Pennsylvania as previously scheduled.[11] On December 22, 2007, Ms. Cinquemano's husband joined her in Carlisle and stayed about a week at the Rodeway Inn.

Mr. Cinquemano persuaded his wife to complain to CRST about the sexual harassment. On December 27, 2007, Ms. Cinquemano made a report of sexual harassment to CRST's Human Resources Department. A member of the Human Resources Department asked Ms. Cinquemano to provide a detailed account of the sexual harassment. On January 2, 2008, Ms. Cinquemano sent a facsimile detailing the harassment to CRST from the Rodeway Inn.

CRST later interviewed Mr. Moore about Ms. Cinquemano's allegations. Mr. Moore suggested that Ms. Cinquemano fabricated her allegations because the Cinquemanos owed him $ 600 and wanted to avoid

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11. Mr. Moore had decided to spend some time at his home. He went out of his way to drop Ms. Cinquemano off in Carlisle so she might avoid having to take a bus from some other location to Carlisle.

repaying their debts to him. He denied swearing at her. Despite Ms. Cinquemano's repeated attempts, CRST broke its promises and never got back to Ms. Cinquemano about the status of its investigation.

Ms. Cinqemano resumed training with CRST in mid-January of 2008. Ms. Cinquemano completed her training with with Mr. Jerry Cummings. Her training with Mr. Cummings was "[f]antastic" and lasted through January of 2008. *Id.* at 672. She began driving with her husband in February of 2008.

All was not well, however, during this time frame. Immediately after she reported her claim of sexual harassment, CRST lowered Ms. Cinquemano's mileage to a "[v]ery low" level. *Id.* at 676. And on February 29, 2008, Cinquemano slipped and injured herself while exiting her truck. The Cinquemanos stayed together in Cedar Rapids for the month March as she recuperated from her injuries, received treatment and performed light duty work in Cedar Rapids.

When Ms. Cinquemano resumed driving with her husband, her dispatcher ordered her to unload a fifty-foot long trailer full of evergreen trees all by herself. The evergreen trees were all taller than Mr. Cinquemano, who is 6' 4" tall. The dispatcher specifically instructed Mr. Cinquemano not to help his wife. It took Ms. Cinquemano a long time to unload all of the trees, and CRST later faulted Ms. Cinquemano for the delay. Ms. Cinquemano complained about her dispatcher to one of CRST's managers, Mr. Jim Chapman. Mr. Chapman told

Ms. Cinquemano he would see if he could transfer her to another dispatcher.

Soon thereafter, on April 15, 2008, CRST fired Ms. Cinquemano. Mr. Chapman explained to Ms. Cinquemano that it was a business decision and not a performance issue. CRST's business was slowing, and there was little freight moving in its system.

In the instant litigation, CRST now cites poor performance as one of the reasons why it fired Ms. Cinquemano. Ms. Cinquemano admits her miles were very low, but believes CRST is using her miles as an excuse to hide its desire to punish her for complaining about sexual harassment.

2. Arguments

CRST argues Ms. Cinquemano's sexual harassment claims under Title VII and ICRA fail for two independent reasons: (1) she did not suffer severe and pervasive sexual harassment and (2) she failed to report any sexual harassment to CRST in a timely manner. CRST also claims Ms. Cinquemano "has no basis whatsoever for a retaliation claim." Brief in Support of Motion (docket no. 145-2), at 11. CRST argues there is "no evidence" in the record to show a causal connection between Ms. Cinquemano's complaint of sexual harassment against Moore and her firing. Reply (docket no. 181), at 16. CRST points out she was terminated months after making her sexual harassment complaint. CRST maintains it fired Ms. Cinquemano because of slow business and poor performance.

Ms. Cinquemano resists the Motion in its entirety. Ms. Cinquemano argues she was subjected to severe and pervasive sexual harassment. She states: "[I]t must be remembered that [she] worked in an environment in which woman [sic] are routinely subject to indecent exposure, masturbation, unwanted propositions, pornography and sexual assaults" and that she "lived, worked and slept with her harasser in a small secluded space virtually twenty-four hours a day." Resistance (docket no. 161), at 33. Ms. Cinquemano does not specifically address CRST's argument that she failed to report her sexual harassment in a timely manner. In other words, Ms. Cinquemano appears to concede that, if Mr. Moore was not her supervisor, CRST may not be held strictly liable for his conduct. Ms. Cinquemano states a reasonable jury could find that she was fired for making a complaint of sexual harassment as opposed to slow business or, as CRST now alleges, poor performance. Not only do CRST's shifting explanations for her firing give rise to an inference of retaliation, but a reasonable jury could find the reduction in miles on the heels of her complaint is damning.

3. Analysis

a. Sexual harassment claims

The court holds Ms. Cinquemano failed to present sufficient evidence to prove her sexual harassment claims. The court assumes without deciding that Ms. Cinquemano suffered severe and pervasive sexual harassment. Because Mr. Moore was Ms. Cinquemano's coworker and not her supervisor, Order (docket no. 197), at 60-61, she is required

to prove that CRST "'knew or should have known of the conduct and failed to take proper remedial action.'" *Joens*, 354 F.3d at 940. She has failed to generate a genuine issue of material fact on this element of her sexual harassment claims. CRST did not know about Mr. Moore's conduct until after it ended. By failing to report Mr. Moore's actions promptly, Ms. Cinquemano did not provide CRST with an opportunity to take proper remedial action. *Cf. Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005) (affirming dismissal of retaliation claim, where the plaintiff "did not report any harassment occurring after . . . [her supervisor] was first alerted that it was in fact [the plaintiff] who was being harassed").

Accordingly, the court shall dismiss Ms. Cinquemano's Title VII and ICRA sexual harassment claims.

b. Retailation claims

The court holds Ms. Cinquemano has presented sufficient evidence to survive summary judgment as to her retaliation claims. There is sufficient evidence of a causal connection between Ms. Cinquemano's protected activity in January of 2008 and her termination in April of 2008.

> Although the temporal proximity between the protected activity and the alleged retaliatory act must generally be 'very close,' the 'employee may attempt to shorten the gap between [the] protected activity and the adverse action by showing that shortly after [the employee] engaged in the protected activity, the employer

took escalating adverse and retaliatory action against [the employee].'

Heaton v. Weitz Co., 534 F.3d 882, 888 (8th Cir. 2008) (quoting *Hite*, 446 F.3d at 866). Here, the approximately four month gap between the protected activity and the adverse employment action weighs against an inference of retaliation. *See Hesse*, 394 F.3d at 633 ("A gap in time between the protected activity and the adverse employment action weakens an inference of retaliatory motive."); *see also Heaton*, 534 F.3d at 888 (intimating that a six month gap in time weighted against an inference of retaliatory motive or was, at the very least, insufficient in itself to establish causation). At the very least, the gap is--in itself--insufficient evidence of retaliation to survive summary judgement. *See Clark County*, 532 U.S. at 273-74 (citing cases holding that three-month and four-month intervals between the protected activity and the adverse employment action were insufficient to establish the requisite causal nexus) (citations omitted); *Kipp*, 280 F.3d at 897 (determining that a two-month interval was, by itself, insufficient to establish a causal nexus). However, as in *Heaton*, "all was not well during this . . . period." 534 F.3d at 888. Immediately following her complaint of sexual harassment, CRST reduced Ms. Cinquemano's hours. One of her dispatchers made her perform the difficult, if not impossible, task of unloading a fifty-foot long trailer full of evergreen trees by herself; CRST later faulted Ms. Cinquemano for failing to unload the evergreen trees in a timely manner. Finally, CRST has offered shifting reasons for her termination over time. *See, e.g., EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007) ("[S]hifting

reasons support a finding of illegal motivation."); *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1023 (8th Cir. 1998) (shifting reasons for termination tend to show proferred reason was pretext for discrimination). Notably, CRST did not present the court with any evidence to document its allegation that Ms. Cinquemano was a poor performer.

In sum, a reasonable jury could find freight was slow and Ms. Cinquemano was a poor performer or a reasonably jury could find CRST fired Ms. Cinquemano because she made a sexual harassment complaint. Under such circumstances, summary judgment is not appropriate. Accordingly, the court shall not dismiss Ms. Cinquemano's Title VII and ICRA retaliation claims.

C. Ms. Grant

Ms. Barbara Grant, a resident of South Carolina, worked as a contract driver for CRST from June to September of 2007. She alleges that one of her trainers, Mr. Jackson Hamp, sexually harassed her from June 17, 2007 to June 27, 2007.

With respect to Ms. Grant's sexual harassment claims, CRST does not dispute that Mr. Hamp subjected Ms. Grant to severe and pervasive sexual harassment. Rather, CRST contends Ms. Grant never reported the sexual harassment to her dispatcher. Although Ms. Grant's deposition testimony is not a model of clarity, the court finds that a reasonable jury could find that Ms. Grant repeatedly complained about Mr. Hamp's severe and pervasive conduct to her dispatcher and her dispatcher

ignored her. *See, e.g.*, Def.'s App'x at 1193 ("I picked up the phone and called Lisa, [who] was my fleet manager, and I told her what was going on . . . ."); Pl.'s App'x at 54 ("Like I said, at some point I had to tell Lisa. I don't know what day it was, but she knew what was happening, and she never done [sic] anything about it until the day that he started to pull me off in New Mexico . . . . There is no way I could have taken a whole week with [Mr. Hamp] and not told dispatch at some point what was going on.").

With respect to Ms. Grant's retaliation claims, CRST argues that there is insufficient evidence to establish a causal connection between Ms. Grant's alleged complaints about Mr. Hamp to CRST and any adverse employment action. The court agrees. The circumstances surrounding Ms. Grant's departure from CRST are wholly unclear from the record; it is unclear whether Ms. Grant abandoned her position or CRST terminated Ms. Grant for abandoning her truck after she refused to drive with her final team driver, Mr. William Hawthorne. Even if the court assumes CRST fired Ms. Grant, there was a two-and-one-half month gap between her last complaint of sexual harassment and her termination. Standing alone, this gap in time is too great to establish a causal connection between any protected activity and CRST's adverse employment action. *Kipp*, 280 F.3d at 897. Further, there is no evidence CRST took escalating adverse and retaliatory action against Ms. Grant during the two-and-one-half month period. *Cf. Heaton*, 534 F.3d at 888. Nor has CRST offered shifting reasons for Ms. Grant's termination. *Cf. Wal-Mart Stores*, 477 F.3d at 571.

Accordingly, the court shall not dismiss Ms. Grant's Title VII and ICRA sexual harassment claims. The court shall dismiss Ms. Grant's Title VII and ICRA retaliation claims.

D. Ms. Peeples

1. Facts

Ms. Remcey Jeunenne Peeples a/k/a Jeunenne Peeples a/k/a Jeunenne Lassiter a/k/a Jeunenne Wyatt a/k/a Jeunenne Chaney, a life-long resident of Texas, worked for CRST as a contract driver from August 4, 2005 to September 20, 2005. She alleges her second trainer, Mr. Robert Stanley, sexually harassed her over a three-day period from August 15, 2005 to August 18, 2005. Among other things, Mr. Stanley told Ms. Peeples "he wanted to Velcro [her] hands and [her] feet together," Pl.'s App'x at 67, engaged in unwanted touching of Ms. Peeples' person, told her she "need[ed] to have sex" with him, Def.'s Ex. at 2136, "pointed at his penis and said, 'Don't you want some of this?,'" *id.*, touched her leg, jumped on her bunk while she was in it, made other sexually charged comments and repeatedly propositioned her for sex. He told her his marriage was failing and she "could become his new woman." *Id.* at 2169. The comments escalated over time. At one point, Mr. Stanley told Mr. Peeples: "You know you're going to have to have sex with me to pass this training course." *Id.* at 2137.

Tired and fed up with the sexual harassment, Ms. Peeples left Mr. Stanley's truck at a fuel stop in Arizona

on August 18, 2008, at 1:30 a.m. She also called the police and one of CRST's managers. She told the manager about the sexual harassment.

The manager refused to help Ms. Peeples. Fortunately, a CRST driver who happened to be at the fuel stop offered to drive Ms. Peeples to CRST's nearest terminal in California. The manager agreed to let Ms. Peeples ride with the driver to California, where she might find another trainer.

One of CRST's managers eventually referred Ms. Peeples to CRST's Human Resources Department. Ms. Peeples talked about her sexual harassment with human resources personnel and faxed a complaint. Ms. Peeples' fax contained many obvious errors; numerous dates were clearly incorrect. CRST's Human Resources Department accused Ms. Peeples of lying about the sexual harassment. Around the same time, Ms. Peeples requested a specific new trainer. CRST agreed and assigned Ms. Peeples and her new trainer a load within a few days.

While waiting in California for the load, Ms. Peeples went to a doctor for vaginal bleeding. The doctor diagnosed the bleeding as menopause. Ms. Peeples drove for CRST for approximately one more month.[12] Her vaginal bleeding persisted. On September 20, 2005, Ms. Peeples went to a doctor in Texas for a second opinion. The doctor diagnosed

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12. At some point in time, Ms. Peeples jack-knifed her truck and, on another occasion, ran her truck into a ditch. She received a failing grade for her lack of skill in driving the truck.

Ms. Peeples with cervical cancer. He ordered her to stop driving for CRST lest she risk bleeding to death from all of the truck's vibrations.

Ms. Peeples subsequently underwent radiation and chemotherapy to treat her cervical cancer. Due to the treatments, she has been continuously unable to return to work despite her desire to do so.

2. *Analysis*

Ms. Peeples's Title VII and ICRA sexual harassment claims fail as a matter of law. Assuming without deciding that Ms. Peeples suffered severe and pervasive sexual harassment at the hands of Mr. Stanley,[13] the court must dismiss her sexual harassment claims because she did not report the sexual harassment to CRST in a timely manner. It is undisputed that CRST did not know of Mr. Stanley's conduct towards Ms. Peeples until after it ended; she did not make a complaint of sexual harassment until after she stopped driving with him. By failing to report Mr. Stanley's actions in a timely manner, Ms. Peeples did not provide CRST with an opportunity to take proper remedial action. *Cf. Cheshewalla*, 415 F.3d 847 at 851.

Ms. Peeples's Title VII and ICRA retaliation claims also fail as a matter of law. A reasonable jury could not find a causal connection between Ms. Peeples's complaint

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13. Once again, the court may assume without deciding that certain sworn allegations in a charge of discrimination that contradict subsequent deposition testimony are admissible.

about Mr. Stanley's conduct and any adverse employment action. CRST fired Ms. Peeples because she was diagnosed with cervical cancer, not because she made a complaint of sexual harassment. While CRST fired Ms. Peeples only a month or so after she complained about sexual harassment, it is undisputed that CRST found her a new trainer and a load and continued to employ her without incident until she informed CRST she was physically unable to drive a truck. Indeed, it is undisputed that Ms. Peeples' was physically unable to drive a semi-truck due to her cervical cancer and subsequent chemotherapy and radiation. Ms. Peeples offers only speculation in support of her retaliation claim, and speculation is insufficient to withstand summary judgment. *Reasonover*, 447 F.3d at 578.

Accordingly, the court shall dismiss Ms. Peeples from this case with prejudice.

E. Ms. Starke

On May 13, 2009, the court dismissed Ms. Starke from this lawsuit with prejudice. Accordingly, the court need not reach CRST's arguments in the Motion for dismissal of Ms. Starke's sexual harassment and retaliation claims. Accordingly, the court shall deny this portion of the Motion.

Appendix I

F. Ms. Thomas

1. Facts

Ms. Latesha Thomas, a resident of Florida, worked for CRST from November 13, 2006, to December 14, 2006. She drove with two trainers, Messrs. Brian Taft and Donald Brown. Mr. Taft did not sexually harass Ms. Thomas.

Ms. Thomas trained under Mr. Brown from late November of 2006 to mid-December of 2006. Her experience was "hell." Def.'s App'x at 3095. As soon as Ms. Thomas boarded Mr. Brown's truck, Mr. Brown informed Ms. Thomas that they would have to sleep in the same bunk because the top bunk was broken. When Ms. Thomas threatened to call their dispatcher, Mr. Brown suddenly found a way to fix the top bunk.

Mr. Brown made sexual comments to Ms. Thomas. For example, when Ms. Thomas left the truck he would say: "[W]ould you like some fries with that shake[?]" Def.'s App'x at 3095. Mr. Brown also propositioned Ms. Thomas for sex. Mr. Brown, who is African-American, would hold his crotch and "say[] that he haven't [sic] been with a black woman in so many years, he wanted to know how it would feel to be with a black woman, . . . he wouldn't mind sleeping with [her] . . . ." *Id.* at 3095-96.

On their third day of driving together, Mr. Brown began sleeping in the truck in the nude. Mr. Brown repeatedly told Ms. Thomas he was nude, and she could see him taking off his clothes. On one occasion, Mr. Brown

put his hand on Ms. Thomas's bed and told her he wanted to have sex with her. He also tried to touch her in an inappropriate way.

Ms. Thomas called her dispatcher and told her about all of Mr. Brown's antics. The dispatcher told Ms. Thomas that CRST "would get with [Mr.] Brown and see what's going on." *Id.* at 3097.

The harassment continued unabated. Mr. Brown rubbed Ms. Thomas's leg and told her he would take care of her financially and sexually. Mr. Brown continued to tell Ms. Thomas that he wanted to have sex with her and that he "he wanted to make sure [she] was satisfied because [she] hadn't been with a man . . . ." *Id.* at 3101.

> After he would argue with his girlfriend, he would say he needs to get his nut off, and when I was ready for him, he's down in the bunk, let him know when I'm ready for him. He would grab. . . between his legs and told me he was ready. It even happened in Georgia when the truck was broke down . . . during that time frame he [said:] "Well, we could have sex to pass time by till someone comes and put gas in the truck . . . ."

Id. at 3098. Mr. Brown also offered Ms. Thomas $ 800 to have sex with him. "He said that since I won't give it to him freely he'd offer me $ 800 because he kn[e]w I need[ed] the money[.]" *Id.* at 3101.

Mr. Brown became angry after Ms. Thomas repeatedly refused his sexual advances. He yelled and swore at her. He criticized her driving performance and, on one occasion, left her in the truck alone on a cold and wet night without any heat.

Ms. Thomas contacted her dispatcher a second time and told the dispatcher about Mr. Brown's continuing sexual harassment. She told her dispatcher she did not appreciate Mr. Brown's sexual advances. Again, the dispatcher ignored her complaints. He only wanted to ensure timely delivery of freight. Nothing changed.

Ms. Thomas pleaded with Mr. Brown to leave her alone. Ms. Thomas told Mr. Brown she could not endure the sexual harassment and, as a consequence, refused to drive his truck. Mr. Brown told Ms. Thomas to "get the hell off my damn truck, and I'll put your ass out." *Id.* at 3102. The truck was in the middle of nowhere in Georgia, several hours from Ms. Thomas's home in Florida. Ms. Thomas got off the truck and never drove for CRST again.

2. *Analysis*

CRST argues that Ms. Thomas did not suffer severe and pervasive sexual harassment and, in any event, she failed to report any sexual harassment to CRST. CRST's arguments are not well taken. From the foregoing facts, a reasonable jury could find Thomas suffered severe and pervasive sexual harassment. Mr. Brown's sexually charged actions were frequent, severe, humiliating and unreasonably interfered with Ms. Thomas's work

performance. *See Clark County,* 532 U.S. 268 at 270-71, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (requiring the court to consider the totality of the circumstances). This is not a case of "simple teasing, offhand comments, and isolated incidents." *Faragher,* 524 U.S. at 788. Further, a reasonable jury could find that CRST management knew about the sexual harassment and did nothing to stop it. Although Ms. Thomas's deposition testimony is not a model of clarity, when read in the light most favorable to her, a reasonable jury could find she informed CRST about Mr. Brown's actions in a timely manner. Summary judgment is, therefore, inappropriate. *See, e.g., Jenkins v. Winter,* 540 F.3d 742, 750 (8th Cir. 2008) (reversing grant of summary judgment to employer for coworker harassment "[a]lthough the affidavits do not provide specific dates")

Ms. Thomas concedes she does not have viable retaliation claims under Title VII or ICRA against CRST. Ms. Thomas asserts she wishes to pursue "constructive discharge claims" under Title VII and ICRA in lieu of the retaliation claims she pled. "An employee is constructively discharged when he or she involuntarily resigns to escape intolerable and illegal employment requirements." *Barrett v. Omaha Nat'l Bank,* 726 F.2d 424, 428 (8th Cir. 1984). However, "'[a]n employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.'" *Tenkku v. Normandy Bank,* 348 F.3d 737, 742 (8th Cir. 2003) (quoting *West v. Marion Merrell Dow, Inc.,* 54 F.3d 493, 497 (8th Cir. 1995)). The court expresses no view as to the merits of Ms. Thomas's proposed constructive discharge claims in the absence of complete briefing. It is unclear whether Ms. Thomas's

proposed constructive discharge claims are properly before the court.

Accordingly, the court declines to dismiss Ms. Thomas's Title VII and ICRA sexual harassment claims. The court dismisses Ms. Thomas's Title VII and ICRA retaliation claims with prejudice.

V. NON-EXTRATERRITORIALITY OF ICRA

A. Arguments

In the alternative, CRST argues the court must dismiss all of the ICRA claims of Mss. Grant and Thomas[14] because they are not residents of Iowa and their claims arose outside of Iowa. In other words, CRST argues ICRA does not apply extraterritorially. CRST points out that neither Ms. Grant nor Ms. Thomas alleges she was sexually harassed within the borders of the State of Iowa; indeed, there is no evidence either woman drove through Iowa. Ms. Grant, a resident of South Carolina, alleges she was sexually harassed in Alabama, Arizona and New Mexico. Ms. Thomas, a resident of Florida, alleges she was sexually harassed in Illinois, Georgia and Oklahoma. CRST maintains the court must construe ICRA to apply only to conduct occurring within its own borders to avoid difficult questions of constitutional law, including "substantial constitutional questions under the

14. CRST also makes its extraterritoriality argument with respect to Mss. Peeples and Starke. Because the court has already dismissed Mss. Peeples and Starke from this lawsuit, the court need not consider this portion of CRST's alternative argument.

Commerce Clause, Full Faith and Credit Clause, and the Due Process Clause." Reply (docket no. 181), at 22 (citing *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850, 50 Cal. Rptr. 2d 626, 631-32 (Ct. App. 1996)). CRST claims the mere fact it maintains its headquarters in Iowa is an insufficient basis for Mss. Grant and Thomas to assert ICRA claims.

Mss. Grant and Thomas argue that ICRA applies extraterritorially. They do not dispute CRST's characterizations of their residences or the states in which they were sexually harassed. Rather, they point out that the statutory language of ICRA contains no apparent restriction on its extraterritorial application. Further, Mss. Grant and Thomas point out that the ICRC apparently believed it had jurisdiction over their charges when it issued their right to sue letters, and "[t]hese determinations by the [ICRC] deserve deference." Resistance (docket no. 161), at 50. Finally, Mss. Grant and Thomas query:

> It is unusual for an Iowa company to be complaining about being required to answer to an Iowa law. If Iowa was not appropriate, in what state, or states should the claims have been filed? Should [Ms. Grant] have brought her claim in South Carolina, even though there is no evidence that CRST is linked to that state? Was she required to have filed separate claims in Alabama, Arizona, and New Mexico where the harassment occurred[?] That seems incredibly inefficient and could lead to

> inconsistent results. Plus, what happened in one state, or a combination of states[,] may not have individually been severe or pervasive, although what happened in all states might have been. Dividing these claims up does not seem to make sense. We agree that a line had to be drawn somewhere. The line was drawn by the Iowa [General Assembly]. In fact[,] where the [General Assembly] drew the line makes sense and is in no way unfair to CRST. Isn't it easier for them to defend their claim in an Iowa Court applying Iowa law? It also should be remembered that the fact that the headquarters happen[s] to be located in Cedar Rapids is not the only connection that these cases have to Iowa. [CRST's Human Resources Department ("HR")] is located in Cedar Rapids. Numerous policies, actions, inactions and employment decisions by HR, including the retaliatory discharges, that impact these cases were made in Cedar Rapids. Some of the dispatchers, whose actions, or inactions, are a part of this lawsuit, were located in Cedar Rapids.

Id.

B. Analysis

ICRA does not explicitly speak to the issue presently before the court. Nothing within the text of ICRA indicates whether the Iowa General Assembly intended for ICRA to apply beyond the borders of the State of Iowa.

Further, the Iowa Supreme Court has not yet decided whether ICRA operates extraterritorially. Whether ICRA extends beyond the borders of the State of Iowa is a matter of first impression.

At first blush, it would appear ICRA might apply extraterritorially. ICRA contains broad terms. It purports to apply to all employers, that is, "every . . . person employing employees within the state." Iowa Code § 216.2(7). ICRA defines "employee" recursively as "any person employed by an employer." *Id.* § 216.2(6). CRST has its headquarters at Cedar Rapids, Iowa and employs persons there, and Ms. Grant and Thomas worked for CRST.

Nonetheless, the court may not read ICRA in a vacuum but must construe its plain language against the backdrop of the non-extraterritoriality principle of statutory construction. It is settled that the Supreme Court of the United States and the Iowa Supreme Court each ordinarily presume that a statute does not apply extraterritorially absent an *affirmative indication* to the contrary within such statute. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (holding former version of Title VII did not apply extraterritorially), *superseded by statute as recognized in Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); *Powell v. Khodari-Intergreen Co.*, 334 N.W.2d 127, 131 (Iowa 1983) ("It is a generally recognized principle that a statute of one state has no extraterritorial effect beyond its borders."); *State Surety Co. v. Lensing*, 249 N.W.2d 608,

611 (Iowa 1977) (holding surety bond issued under Iowa Code § 322.4(7) (1971) did not protect a non-resident who purchased a car outside of the State of Iowa from an Iowa dealer); *Beach v. Youngblood*, 215 Iowa 979, 247 N.W. 545, 550 (Iowa 1933) (holding district court erred in ordering foreclosure of certain real property located in Minnesota).

Lensing is instructive and sheds light on how the Iowa Supreme Court would likely construe ICRA. In *Lensing*, the Iowa Supreme Court held a surety bond given by an Iowa-licensed automotive dealer pursuant to the provisions of Iowa Code § 322.4(7) (1971) did not protect a non-resident buyer who purchased a car from the dealer outside the borders of the State of Iowa. 249 N.W.2d at 611. The Iowa Supreme Court reasoned:

> Unless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it. Thus, an extraterritorial effect is not to be given statutes by implication. Accordingly, a statute is prima facie operative only as to persons or things within the territorial jurisdiction of the lawmaking power which enacted it. These rules apply to a statute

> using general words, such as 'any' or 'all,' in describing the persons or acts to which the statute applies. They are also applicable where the statute would be declared invalid if given an interpretation resulting in its extraterritorial operation.

Id.(citing 73 Am. Jur. 2d *Statutes* § 395); *see also Arabian Am. Oil*, 499 U.S. at 248 (requiring that "the affirmative intention of the Congress [be] clearly expressed" to overcome the presumption against extraterritoriality); *Judkins v. St. Joseph's Coll. of Me.*, 483 F. Supp. 2d 60, 65 (D. Me. 2007) ("Clear and explicit language is necessary to overcome the presumption against extraterritorial application of a statute.").

In light of the foregoing, the court holds that ICRA does not apply extraterritorially notwithstanding its facially broad language. Nothing in the language, purpose, subject matter or history of ICRA clearly expresses or indicates that the Iowa General Assembly intended ICRA to operate beyond the borders of the State of Iowa. ICRA's "boilerplate language" is not a sufficiently clear expression of legislative intent to overcome the presumption against extraterritoriality. *See, e.g., Arabian Am. Oil*, 499 U.S. at 251 (holding "boilerplate language" insufficient to overcome the presumption against extraterritoriality); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 191 (Ky. 2001) (holding facially broad language, including the use of "any" and "all," to be insufficient to extend the Kentucky Human Rights Act extraterritorially). When the Iowa General Assembly intends that a statute operate

extraterritorially, it explicitly says so. *See, e.g.*, Iowa Code § 85.71 (2009) (expressly extending Iowa's workers' compensation statute outside of the borders of the State of Iowa). The court predicts the Iowa Supreme Court would "ma[k]e a policy decision, based on a combination of interstate comity and a desire to avoid choice-of-law difficulties, not to apply [ICRA] to employment situations that might arguably create a conflict with the laws of other states." *Ferrer v. Medastat USA, LLC*, 145 F. App'x 116, 120 (6th Cir. 2005). Conflicts are not hard to imagine, because ICRA prohibits more forms of discrimination than the civil rights laws of various other states. *See, e.g.*, Iowa Code § 216.6 (outlawing discrimination on the basis of "sexual orientation" and "gender identity"). Imposing the Iowa General Assembly's "policy choice on the employment practices of [its] sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution." *Ferrer*, 145 F. App'x at 120 (quoting *Union Underwear*, 50 S.W.3d at 193. The court's conclusion that ICRA does not apply extraterritorially is consistent with the overwhelming majority of courts to consider the extraterritoriality *vel non* of other jurisdictions' civil rights statutes. *See, e.g.*, *Arabian Am. Oil*, 499 U.S. at 248 (holding former version of Title VII did not apply extraterritorially); *Ferrer*, 145 F. App'x at 119-20 (holding Kentucky Human Rights Act did not apply extraterritorially); *Campbell*, 50 Cal. Rptr. 2d at 627-33 (holding California's Fair Employment and Housing Act did not apply to a plaintiff working on the high seas); *Union Underwear*, 50 S.W.3d at 193 (holding Kentucky Human Rights Act did not apply extraterritorially);

Judkins, 483 F. Supp. 2d at 65 (holding a non-resident was not entitled to Maine Human Rights Commission's longer filing period for age discrimination suit against a Maine college, because all alleged discriminatory acts took place at the college's campus in the Carribean); *Wahlstrom v. Metro-N. Commuter R.R.*, 89 F. Supp. 2d 506, 527-28 (S.D.N.Y. 2000) (holding a plaintiff failed to state a cause of action under the New York City Human Rights Law because the plaintiff did not allege that any cognizable harassment occurred while the train on which she worked was within New York City, even though she and the male engineer traveled together in New York City, the train company's headquarters was in New York City and the company distributed employment policies from its office there); *Arnold v. Cargill, Inc.*, NO. Civ. 012086(DWF/AJB), 2002 U.S. Dist. LEXIS 13045, 2002 WL 1576141, *1-*4 (D. Minn. Jul. 15, 2002) (holding Minnesota Human Rights Act did not apply extraterritorially).

Accordingly, the court dismisses the ICRA sexual harassment claims of Mss. Grant and Thomas with prejudice, Mss. Grant and Thomas are not residents of Iowa and all of the alleged sexual harassment occurred entirely outside of Iowa.[15]

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15. The court recognizes that the dispatchers' failures to respond to the sexual harassment complaints is an element of the claims of Mss. Grant and Thomas. However, it is unclear where these dispatchers were located at the time they ignored such complaints. This is certainly not a case in which "every decision that gives rise to [the plaintiffs'] claim[s]" occurred in Iowa. *Union Underwear*, 50 S.W.3d at 193 n.1 (Lambert, C.J., dissenting). The court expresses no view as to whether the extraterritoriality principle would bar the retaliation claims of Mss. Grant and Thomas.

VI. CONCLUSION

The Motion (docket no. 145) is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) Ms. Janet Boot and Ms. Remcey Jeunenne Peeples are **DISMISSED** from this lawsuit **WITH PREJUDICE.**

(2) Ms. Nicole Cinquemano's Title VII and ICRA sexual harassment claims are **DISMISSED WITH PREJUDICE.** Ms. Cinquemano's Title VII and ICRA retaliation claims survive summary judgment.

(3) The Title VII and ICRA retaliation claims of Ms. Barbara Grant and Ms. Latesha Thomas are **DISMISSED WITH PREJUDICE.** The ICRA sexual harassment claims of Mss. Grant and Thomas are likewise **DISMISSED WITH PREJUDICE.** The Title VII sexual harassment claims of Mss. Grant and Thomas survive summary judgment.

(4) All of Ms. Cindy Moffett's claims survive to trial.

(5) The EEOC is **BARRED** from seeking relief at trial to the same extent the Plaintiffs-Interveners are barred.

(6) The EEOC is **ORDERED** to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before June 4, 2009, at 5 p.m.** *See* Order (docket no. 66), *passim.*

(7) Ms. Boot, Ms. Peeples and the EEOC shall pay CRST's ordinary costs. CRST may file its request for costs **10 court days** after the disposition of the entire case.

(8) Any application for attorneys' fees may be filed within **20 court days** after disposition of the entire case.

IT IS SO ORDERED.

DATED this 2nd day of June, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX J — ORDER TO SHOW CAUSE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED MAY 18, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Intervenors,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

May 18, 2009, Decided
May 18, 2009, Filed

Appendix J

ORDER

Defendant's Motion for Order to Show Cause ("Motion") (docket no. 222) is **GRANTED.** Even if the court assumes without deciding that the Motion presents a nonjurisdictional question that may not be raised at any stage in the litigation, the court deems the Motion to be timely given the complex procedural history of this case and the court's recent dismissal of the EEOC's "pattern or practice claim."

After considering the parties' arguments with respect to the Motion, the court has doubts about the EEOC's ability to pursue this matter in whole or in part at trial. In *Delight Wholesale,* the Eighth Circuit Court of Appeals stated:

> The permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or developed during a reasonable investigation of the charge, *so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

973 F.2d 664, 668-69 (8th Cir. 1992) (emphasis added and citations omitted). The Eighth Circuit Court of Appeals held that certain claims not included in the original charge of discrimination were "properly before the district court" but stressed that the EEOC discovered the unincluded claims during a reasonable investigation of the charge, the unincluded claims were "clearly like or related to the substance of the EEOC charge," the "EEOC included the [unincluded claims] in its reasonable cause determination" and the "EEOC gave [the employer] an opportunity to conciliate [the unincluded claims]." *Id.* at 669; *see also EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("The [EEOC]'s functions of investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe Congress directed the [EEOC] . . . [to] institute such litigation before it makes a determination.").

"Nothing less than a 'reasonable' effort to resolve with the employer the issues raised by the complainant will do." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003). "This effort must, at a minimum, make clear to the employer the basis for the EEOC's charges against it." *Id.* "Otherwise, it cannot be said that the [EEOC] has provided a meaningful conciliation opportunity." *Id.* "[C]onciliation is at the heart of Title VII." A lawsuit is "a last resort." *Id.*[1]

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1. In *Asplundh*, the Eleventh Circuit Court of Appeals affirmed the dismissal of a federal enforcement action and an award of attorneys' fees against the EEOC. The Eleventh Circuit Court of Appeals opined that the EEOC may have avoided conciliation to make headlines and press its case against the employer in the

Appendix J

On **June 1, 2009, at 9:00 a.m.,** the court shall hold an evidentiary hearing in the Temporary Courthouse at Cedar Rapids, Iowa. The EEOC shall bear the burden to prove its allegations are properly before the court and should be presented to a jury. The court has reserved the entire day for the evidentiary hearing.

Discovery is **REOPENED** for the limited purpose of ascertaining whether the EEOC satisfied its "jurisdictional prerequisites" to bring this lawsuit on behalf of the approximately 140 allegedly aggrieved individuals for whom it intends to seek relief at trial. *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981); *accord Pierce Packing*, 669 F.2d at 608 ("Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC[.]"). For example, CRST may depose Ms. Pamela Bloomer, one of Plaintiff's investigators, and EEOC may depose Mr. James Barnes, CRST's human resources manager. Discovery shall close **on May 26, 2009.**

Under separate cover, the court shall send the parties

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media. 340 F.3d at 1261. In the present case, the EEOC issued a press release entitled **"TRUCKING GIANT CRST SUED FOR SEXUAL HARASSMENT OF FEMALE 'TEAM' DRIVERS,"** in which Mr. John Hendrickson, Regional Attorney for the Chicago District, and Mr. John P. Rowe, District Director of the Chicago District Office, commented on CRST's alleged practices. Def.'s Ex. 5 (docket no. 222-7), at 2 (emphasis in original). For example, Mr. Hendrickson stated: "This situation is chilling to contemplate: being trained by a sexual harasser on the open road in a sleeper cab, and not getting immediate help when you complain. We think the repetitive nature of the situation as alleged here makes this case especially compelling . . ." *Id.* at 3.

a chart to complete before the evidentiary hearing. In the chart the parties shall identify each allegedly aggrieved person for whom the EEOC intends to seek relief at trial and detail the following: (1) the date(s) the EEOC investigated the allegedly aggrieved person's allegation(s) of sexual harassment; (2) the date(s) on which the EEOC issued a reasonable cause determination as to such person; and (3) the date(s) on which the EEOC and CRST engaged in conciliation or attempted to engage in conciliation as to that person. A completed chart, as well as witness and exhibit lists, shall be filed **on or before May 29, 2009, at 5 p.m.**

The court anticipates affording the parties the opportunity to submit post-hearing briefs. The Final Pretrial Conference is **RESET** to **June 15, 2009, at 9:00 a.m.**

IT IS SO ORDERED.

DATED this 18th day of May, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX K — DECLARATION OF PAMELA BLOOMER IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, WITH EXHIBITS, FILED MAY 15, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-00095-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARK, LATESHA THOMAS, AND NICOLE CINQUEMANO,

Plaintiff-Interveners,

v.

CRST VAN EXPEDITED, INC.

Defendant.

DECLARATION OF PAMELA BLOOMER

PAMELA BLOOMER, under penalty of perjury, states:

Appendix K

1. I am an investigator with the U.S. Equal Employment Opportunity Commission ("EEOC"). I investigated the charges of discrimination that preceded this lawsuit, including Monika Starke's charge, EEOC Charge No. 260-2005-06856C (the "Starke charge"), and Remcey Peeples's charge, EEOC Charge No. 26A-2006-00561C (the "Peeples charge").

2. I conducted conciliation efforts on behalf of EEOC in both the Starke and Peeples charges.

3. The Letter of Determination ("LOD") in the Starke charge was issued on July 12, 2007. The LOD asked CRST to submit a conciliation proposal within 14 days.

4. CRST's counsel, Thomas Wolle, left a voicemail message for me on August 6, 2007 and sent a letter on August 7, 2007 indicating that CRST was interested in participating in conciliation.

5. I sent a fax and left a voicemail message for Mr. Wolle on August 8, 2007 again asking for a conciliation proposal.

6. Later on August 8, 2007 I received a voicemail from Mr. Wolle, indicating he wanted EEOC to suggest a proposal for conciliation instead of the other way around.

7. I spoke with Mr. Wolle regarding EEOC's proposed terms for conciliation on August 17, 2007. We discussed several issues including EEOC's request that a monitor be appointed to examine the employer's workplace to discover and eliminate sexual harassment, and relief for the class. He told me he wanted more information regarding the class. I was not able to provide names of all class members at that time, or an indication of the size of the class, but I believe I told him that EEOC would require as part of conciliation that CRST send a letter to past and present employees to help identify class members so settlements could be paid to them.

8. Mr. Wolle told me on August 17, 2007 that he would think over EEOC's proposal and would try to call me back.

9. We traded voicemails on August 20 and 21. I then called Mr. Wolle on August 24, 2007, and he told me that he had spoken to Ms. Starke's counsel, that it did not appear conciliation would be successful, and that he would send a confirming email. I told him the next step after conciliation would be EEOC's internal decision whether to litigate on behalf of Ms. Starke and the class or provide Ms. Starke with a Right to Sue letter.

10. Attached as Exhibit 1 is the email Mr. Wolle sent me on August 27, 2007, indicating that CRST did not wish to engage in conciliation efforts.

11. Attached as Exhibit 2 is EEOC's letter sent to CRST on August 28, 2007, which confirms that conciliation was not successful.

12. Regarding the Peeples charge, the LOD was issued September 27, 2007.

13. I called James Barnes, CRST's Human Resources Manager, on October 24, 2007, regarding EEOC's request for a conciliation proposal.

14. Attached as Exhibit 3 is an October 25, 2007 email from Mr. Barnes, indicating that he was waiting for an answer from outside counsel regarding conciliation.

15. Attached as Exhibit 4 is an October 26, 2007 email from Mr. Barnes indicating CRST had decided "not to take part in the conciliation process for Ms. Peeples."

16. Attached as Exhibit 5 is EEOC's letter sent to CRST on October 26, 2007, which confirms that conciliation was not successful.

Dated: May 15, 2009

/s/_____
Pamela Bloomer

Appendix K

Exhibit 1

From: "Thomas Wolle" <TWolle@moyerbergman.com>
To: <pamela.bloomer@eeoc.gov>
Date: 8/27/2007 2:45:26 PM
Subject: Monika Starke/CRST Van Expedited, Inc.

Ms. Bloomer: This e-mail serves to confirm our phone conference from last Friday afternoon, in which I indicated that, in light of the monetary demand made by Ms. Starke's attorney Jeff Tronvold, CRST does not wish to engage in conciliation efforts because we are confident that conciliation will not result in a resolution of this matter. Please let me know if you have any questions or concerns. Thank you.

Thomas D. Wolle
Moyer & Bergman, P.L.C.
P.O. Box 1943
Cedar Rapids, IA 52406-1943
Phone: 319-366-7331
Fax: 319-366-3668
Website: www.moyerbergman.com

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Appendix K

Exhibit 2

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Milwaukee Area Office

Charge Number: 260-2005-06856

FEPA Number: 12-05-50880

Monika Starke

vs.

CRST International, Inc.

CRST International, Inc.
Attn: James T. Barnes
3930 16th Avenue SW
Cedar Rapids, IA 52404

Dear Mr. Barnes:

The Commission has determined that its efforts to conciliate this charge as required by Title VII of the Civil Rights Act of 1964, as amended, have been unsuccessful. This letter constitutes the notice required by the Commission's Regulations which provides that the EEOC shall notify a Respondent in writing when it determines that further conciliation efforts would be futile or non-productive.

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The Commission will not make further efforts to conciliate this charge. At this time, we are forwarding the case to our legal unit for possible litigation.

Sincerely,

AUG 28, 2007
Date

/s/
John P. Rowe
District Director

cc: Thomas D. Wolle
c/o Moyer & Bergman, P.L.C.
2720 First Avenue, N.E.
Cedar Rapids, IA 52402

Appendix K

Exhibit 3

From: Jim Barnes/crst_inc <JBarnes@crst.com>
To: <pamela.bloomer@EEOC.gov>
Date: 10/25/2007 5:21:31 PM
Subject: Peeples Update

Ms. Bloomer:

I am following up on our conversation yesterday regarding Remcey Peeples. I am waiting on an answer from outside counsel and will inform you first thing tomorrow.

Thank you

Jim Barnes
Director, Human Resources
CRST International, Inc.
319-390-2770

Appendix K

Exhibit 4

From: Jim Barnes/crst_inc <JBarnes@crst.com>
To: <pamela.bloomer@EEOC.gov>
Date: 10/26/2007 11:20:28 AM
Subject: Peeples response

Ms. Bloomer:

We have decided not to take part in the conciliation process for Ms. Peeples.

Thanks

Jim Barnes
Director, Human Resources
CRST International, Inc.
319-390-2770

Appendix K

Exhibit 5

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Milwaukee Area Office

Charge Number: 26A-2006-00561C

Remcey Peeples

vs.

CRST International, Inc.

CRST International, Inc.
Attn: James T. Barnes
3930 16th Avenue SW
Box 68
Cedar Rapids, IA 52404

Dear Mr. Barnes:

The Equal Employment Opportunity Commission (EEOC) has determined that its efforts to conciliate this charge have been unsuccessful. This letter constitutes the notice required by Section 1601.25 of the EEOC's Procedural Regulations which provides that the EEOC shall notify a respondent in writing when it determines that further conciliation efforts would be futile or non-productive.

The EEOC will not make further efforts to conciliate this charge. At this time, we are forwarding the case for possible litigation.

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Sincerely,

Oct 26, 2007
Date

/s/
John P. Rowe
District Director

APPENDIX L — SUMMARY JUDGMENT ORDER ON JUDICIAL ESTOPPEL OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED MAY 13, 2009

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARKE, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Intervenors,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

May 13, 2009, Decided
May 13, 2009, Filed

Appendix L

LINDA R. READE, CHIEF JUDGE, U.S. DISTRICT JUDGE.

ORDER

TABLES INTENTIONALLY OMITTED

I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s Motion for Summary Judgment Based on Judicial Estoppel ("Motion") (docket no. 144).

II. RELEVANT PRIOR PROCEEDINGS[1]

On February 13, 2009, Defendant CRST Van Expedited, Inc. ("CRST") filed the Motion. On March 16, 2009, the Equal Employment Opportunity Commission ("EEOC") and Plaintiff-Intervenor Monika Starke ("Ms. Starke") filed Resistances (docket nos. 160 & 163). On March 31, 2009, CRST filed a Reply (docket no. 178).

CRST requests oral argument on the Motion, but the court finds oral argument is not appropriate. The Motion is fully submitted and ready for decision.

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1. A more complete recitation of the prior proceedings is set forth in the court's Order (docket no. 197). The court assumes complete familiarity with the prior proceedings.

Appendix L

III. THE MERITS

A. Summary of Argument

In the Motion, CRST asks the court to (1) dismiss Ms. Starke's federal and state law claims in the "Plaintiffs'/ Intervenors' Complaint" (docket no. 49) and (2) bar the EEOC from seeking monetary and other relief on behalf of Ms. Christina Payne and Ms. Robin Timmons.[2] CRST invokes the doctrine of judicial estoppel and points out that all three women (1) filed for bankruptcy after their alleged sexual harassment occurred, (2) failed to disclose any cause of action against CRST in their bankruptcy filings; (3) had their debts discharged under Chapter 7 or are presently in repayment under Chapter 13 of the Bankruptcy Code; and (4) seek monetary damages from CRST in this action notwithstanding their prior false assertions to the bankruptcy courts.

Neither Ms. Starke nor the EEOC disputes the underlying facts. Rather, Ms. Starke argues "[s]ummary judgment is inappropriate against [her] because judicial

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2. CRST also asks the court to bar the EEOC from seeking relief on behalf of Ms. Antonia Aguilar, Ms. Linda Austin and Ms. Catherine Howard. On May 11, 2009, the court issued an Order (docket no. 223), in which it barred the EEOC from seeking relief for these three women on statute of limitations grounds. Therefore, the court need not discuss CRST's arguments with respect to Ms. Aguilar, Ms. Austin and Ms. Howard in the instant Order. Out of an abundance of caution, however, the court has reviewed the parties' arguments and would hold the EEOC is estopped from seeking relief for them.

estoppels [sic] is an affirmative defense that had to have been, but was not timely pleaded[.]" Resistance (docket no. 160), at 1. Ms. Starke also claims her failure to disclose in her bankruptcy proceeding was wholly inadvertent--she points out she is German, struggles with English and hired an attorney to help her file for bankruptcy. Finally, Ms. Starke points out she recently moved to reopen her bankruptcy case to disclose the possibility that she might recover a judgment in this case.

The EEOC claims it is categorically immune from the doctrine of judicial estoppel, because it is a federal agency with its own interests. The EEOC points out it was not a party to any bankruptcy proceeding, and Ms. Payne and Ms. Timmons are not parties to this case. The EEOC agrees with Ms. Starke that there is not "one piece of evidence that could establish the necessary intent to permit [the] inference" that Ms. Starke, Ms. Payne or Ms. Timmons intended to mislead a bankruptcy court. Resistance (docket no. 163), at 12. The EEOC also agrees that Ms. Starke's motion to reopen her bankruptcy proceeding should shield her from the judicial estoppel doctrine.

In Reply, CRST largely reasserts the arguments in its Motion. Further, CRST opines that the EEOC's argument that it is categorically immune from the doctrine of judicial estoppel is misplaced and contrary to Supreme Court precedent, which recognizes that the prior conduct of allegedly aggrieved persons may limit the relief that the EEOC may obtain in an enforcement action under 42 U.S.C. § 2000e-5. CRST opines that Ms. Starke's motion

to reopen her bankruptcy proceeding came too late and, in any event, the bankruptcy court denied her motion because she failed to prosecute it.

B. Standard for Summary Judgment

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and

by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g., Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

C. Summary Judgment Facts

The facts are largely undisputed. The court first discusses Ms. Starke and then Ms. Payne and Ms. Timmons.

1. Ms. Starke

In July and August of 2005, Ms. Starke's lead drivers, Messrs. Bob Smith and David Goodman, allegedly sexually harassed her while she was training to become a CRST truck driver. In October of 2005, Ms. Starke and her husband filed a voluntary petition as joint debtors under Chapter 7 of the Bankruptcy Code in the United States District Court for the Northern District of Texas. They did not list a claim for sexual harassment among their assets in their bankruptcy petition, any schedule attached thereto or in their statement of financial affairs

("SOFA"). To the contrary, on Schedule B, Category 21, of their bankruptcy petition, which requests identification of "[o]ther contingent and unliquidated claims of every nature," the Starkes affirmatively checked a box indicating "None." Def.'s App'x at 2956. The Starkes also listed CRST as a creditor on Schedule F in the amount of $ 3,100. The Starkes declared under penalty of perjury that their petition, schedules and SOFA were true and correct to the best of their knowledge, information and belief.

In December of 2005, Ms. Starke filed a charge of sex discrimination with the EEOC and the Iowa Civil Rights Commission ("ICRC") against CRST based upon the conduct of Messrs. Smith and Goodman.

In January of 2006, the Starkes amended their Schedule F to list an additional unsecured creditor but did not disclose a potential civil rights claim against CRST. In March of 2006, the bankruptcy court granted the Starkes a full discharge of their debts, including the $3,100 they owed CRST.

In September of 2007, the EEOC filed the instant lawsuit on behalf of Ms. Starke and "a class of similarly situated female employees of [CRST.]" Complaint (docket no. 2), at 1. In September of 2008, the court granted Ms. Starke permission to intervene in the instant action.

In December of 2008, the Starkes filed a motion to reopen their bankruptcy proceeding to add as a potential asset under Schedule B their pending federal and state law claims against CRST.

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2. Ms. Payne

Mr. Mark Hoagland allegedly sexually harassed Ms. Payne sometime between January and April of 2005.

In October of 2005, Ms. Payne filed a voluntary petition and plan under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio under the name of "Christina Sprinkle." Ms. Payne did not list a claim for sexual harassment against CRST among her assets in that petition for bankruptcy, any schedule attached thereto or in her SOFA. To the contrary, on Schedule B, Category 20 of her petition, requesting the identification of "[o]ther contingent and unliquidated claims of every nature," Ms. Payne checked the box indicating she had "None." Def. App'x at 2088. Ms. Payne declared under penalty of perjury that her petition, schedules and SOFA were true and correct to the best of her knowledge, information and belief. In December of 2005, the bankruptcy court approved her plan, which paid her creditors five cents for every dollar owed.

In September of 2007, the EEOC filed the instant lawsuit on behalf of Ms. Starke and "a class of similarly situated female employees of [CRST.]" Complaint (docket no. 2), at 1. In October of 2008, the EEOC identified Ms. Payne as one of its "class members" for whom it seeks monetary and other relief.

In June of 2008, the bankruptcy trustee moved to dismiss Ms. Payne's bankruptcy for non-payment. In November of 2008, the trustee filed an affidavit of default

in support of the trustee's motion to dismiss. In December of 2008, Ms. Payne filed a resistance to the motion to dismiss, in which she acknowledged she was in arrears but informed the court she was newly employed and planned to pay off the balance of her payment plan. She did not amend her schedules or otherwise inform the court or trustee that she was a "class member" in the instant EEOC enforcement action.

3. Ms. Timmons

In December of 2005 and January of 2006, Mr. John Boyle allegedly sexually harassed Ms. Timmons.

In September of 2007, the EEOC filed the instant lawsuit on behalf of Ms. Starke and "a class of similarly situated female employees of [CRST.]" Complaint (docket no. 2), at 1.

In March of 2008, Ms. Timmons and her husband filed a voluntary petition as joint debtors under Chapter 7 of the Bankruptcy Code in the United States District Court for the Western District of Missouri. Ms. Timmons did not disclose any potential cause of action against CRST as an asset of her bankruptcy estate. To the contrary, she affirmatively entered "None" in response to Category 21 of Schedule B of her petition, which requires the identification of any "[o]ther contingent and liquidated claims of every nature[.]" Def.'s App'x at 3171. The Timmonses listed CRST as a creditor, however, in the amount of $5,236.09. Based upon her representations, made under penalty of perjury, the bankruptcy court discharged the Timmonses' debts in June of 2008.

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In October of 2008, the EEOC identified Ms. Timmons as a "class member" in this action. Ms. Timmons has not moved to reopen her bankruptcy to list her status as a "class member" in this EEOC enforcement action as a potential asset, notwithstanding the fact that she would receive money the EEOC wins on her behalf.

D. Analysis

For the reasons stated in the Motion and the Reply, the court shall grant the Motion. Ms. Starke is judicially estopped from pursing her federal and state law claims in this action because she failed to disclose them in her bankruptcy proceeding. Similarly, the court holds the EEOC is judicially estopped from seeking relief on behalf of Ms. Christina Payne and Ms. Robin Timmons. The court finds all three women have made false assertions to federal bankruptcy courts and are attempting to profit from those assertions in this court. The court finds the actions of the three women were not inadvertent.

The judicial estoppel doctrine "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)). Put simply, "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be

to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *Id.* (quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895)). The purpose of the judicial estoppel doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* (citations and internal quotation marks omitted).

There is no rubric or settled formula for a court to apply when deciding whether to apply the doctrine of judicial estoppel. *Id.* Each case will likely turn on its own facts, and courts must not "establish inflexible prerequisites" before applying the doctrine. *Id.* at 751. Rather, the Supreme Court has identified four factors that will "typically" inform a decision to apply the judicial estoppel doctrine. *Id.* at 750. The Supreme Court stated:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would

> derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations and internal quotation marks omitted).

"In the bankruptcy context, a party may be judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006) (citing *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999)). "A debtor's failure to list a claim in the 'mandatory bankruptcy filings is tantamount to a representation that no such claim existed.'" *Id.* (citing *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004)). The Eighth Circuit Court of Appeals and this court routinely dismiss civil actions, including civil rights actions, after a plaintiff/debtor affirmatively misrepresents to a bankruptcy court that her bankruptcy estate did not possess such an action and the bankruptcy court relied on the misrepresentation in some measure. *See, e.g., Strong v. Am.'s Ctr. Food Serv. Partners/Levy Rests. Ltd. P'ship*, 189 F. App'x 587, 587 (8th Cir. 2006) ("Strong represented in her earlier bankruptcy proceeding that she had no such suit, the bankruptcy court relied on that representation in granting her a no-asset discharge, and allowing Strong to proceed with this claim after her discharge would give her an unfair advantage."); *U.S. ex rel. Gebert v. Trans. Admin. Servs.*, 260 F.3d 909, 917-19 (8th Cir. 2001) (affirming dismissal of *qui tam* suit after plaintiffs/debtors failed to disclose suit in their bankruptcy proceeding and

bankruptcy court granted them a discharge); *Tokheim v. Ga.-Pac. Gypsum LLC*, No. 07-CV-3057-MWB, 606 F. Supp. 2d 988, 2009 U.S. Dist. LEXIS 27239, 2009 WL 873990, *6-*10 (N.D. Iowa Mar. 31, 2009) (Bennett, J.) (dismissing sex discrimination case on judicial estoppel grounds and observing that "[n]umerous federal courts of appeals, including the Eighth Circuit Court of Appeals, have held that the omission of a cause of action as an asset in bankruptcy provides an appropriate basis for imposing judicial estoppel"); *cf. Stallings*, 447 F.3d at 1046-49 (holding district court abused its discretion in applying the judicial estoppel doctrine, where the bankruptcy court never discharged the debts of the plaintiff/debtor and the plaintiff/debtor "could not have known at the time he filed his bankruptcy petition to disclose [his] claims" because he was already in Chapter 13 when the facts giving rise to his claim occurred). The Eighth Circuit Court of Appeals and this court do "not allow the debtor to conceal its claims, get rid of its creditors 'on the cheap,' and start over with a 'bundle of rights.'" *Stallings*, 447 F.3d at 1048 (citing *Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993)). "Because the debtor obtained judicial relief on the representation that no such claims existed, the debtor is prohibited from resurrecting such claims and obtaining relief on the opposite basis.'" *Id.*

The judicial estoppel doctrine clearly applies to Ms. Starke, Ms. Payne and Ms. Timmons. Each of these women (1) affirmatively represented to a bankruptcy court that she did not have a claim against CRST yet presses such claim in the instant action; (2) persuaded a bankruptcy court to rely upon the false assertion that no

claim existed to either obtain a no-asset discharge under Chapter 7 or obtain relief from her debts under Chapter 13; and (3) would gain an unfair advantage in the present case were she allowed to profit from her false assertion to the bankruptcy court. Indeed, the circumstances surrounding each woman's case present the classic case wherein other courts have invoked judicial estoppel. *See, e.g., Stallings*, 447 F.3d at 1048 ("[A] debtor who filed his bankruptcy petition, subsequently receives a right-to-sue letter from the [EEOC], and then fails to amend his bankruptcy petition to add his lawsuit against his employer as a potential asset is estopped from bringing the lawsuit because the debtor 'knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court.'" (quoting *DeLeon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003)).

The actions of Ms. Starke and Ms. Timmons are especially galling. Ms. Starke and Ms. Timmons used the bankruptcy process to discharge or reduce debts *owed to CRST* and now seek to recover funds from CRST free and clear of the bankruptcy process. Judicial estoppel is "especially" appropriate under such circumstances. *See New Hampshire*, 532 U.S. at 750 ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, *especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.*'" (Emphasis added.)).

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Notwithstanding her professed reliance upon counsel and unfamiliarity with English and the American legal system, Ms. Starke's actions certainly are not inadvertent or unintentional. *See Stallings*, 447 F.3d at 1048 ("'A debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.'" (quoting *Coastal*, 179 F.3d at 210 (emphasis in *Coastal*)); *Cannon-Stokes v. Potter*, 453 F.3d 446, 449 (7th Cir. 2006) ("[B]ad legal advice does not relieve the client of the consequences of her own acts."); *Tokheim*, 2009 U.S. Dist. LEXIS 27239, 2009 WL 873990, at *6-*10 (rejecting advice of counsel defense). The fact Ms. Payne and Ms. Timmons have not undertaken *any* efforts to inform the bankruptcy courts of their false assertions and the fact that Ms. Starke only made a halfhearted, abortive and unsuccessful effort to do so are especially telling of their intentions. *See, e.g.*, *EEOC v. J.D. Streett & Co.*, No. 05-CV-4186-JPG, 2006 U.S. Dist. LEXIS 78906, 2006 WL 3076667, *4-*5 (S.D. Ill. Oct. 30, 2006) (pointing out that a plaintiff's failure to amend bankruptcy filings "is evidence that her pursuit of this case in light of her failure to list her cause of action was no unintentional error").

The judicial estoppel doctrine applies part-and-parcel to the EEOC, notwithstanding the fact that it is the "master of its own case" and does not merely stand in the shoes of the allegedly aggrieved persons for whom it seeks relief in this action under 42 U.S.C. § 2000e-5. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). Another district court recently surveyed the law and reasoned:

Appendix L

Judicial estoppel is an equitable doctrine. It is clear that had the Cooks filed this action judicial estoppel would apply and bar them from proceeding with their claims for monetary damages. It is also clear that the Cooks will receive any monetary damages recovered by the EEOC in this action. The court fails to see how it would be equitable to allow the Cooks to receive monetary damages recovered by the EEOC on their behalf after the Bankruptcy Court discharged their debts in reliance on their false disclosures when they would not be entitled to receive such monetary damages had they filed the action on their own behalf. Such a result would allow the Cooks to have their cake and eat it too, and would represent the type of abuse which judicial estoppel is designed to preclude.

While not applying judicial estoppel, numerous courts . . . have recognized that where equity would preclude a claimant from seeking relief, it also operates to preclude the EEOC from seeking relief on the claimant's behalf. *See e.g. EEOC v. Sidley Austin, LLP,* 437 F.3d 695 (7th Cir.2006) (recognizing that collateral estoppel prevents EEOC from recovering damages for a claimant who had previously litigated the same claim); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) ("By claiming or accepting individual relief won by the EEOC, the individuals would

> necessarily concede that the EEOC was their representative and that they were embraced by the EEOC's judgment. For those individuals who had previously brought their own suits against USX and lost on the merits, this concession would be fatal. Having had their day in court, these individuals could not relitigate the same claim through a representative any more than they could relitigate the same claim on their own behalf."); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007 (6th Cir. 1975) (finding that a claimant's acceptance of an arbitration award and his filing of a separate action precluded the EEOC from basing a lawsuit based solely on the claimant's charge).

EEOC v. Dave's Detailing, Inc., No. 3:07-CV-516-S, 2008 U.S. Dist. LEXIS 36202, 2008 WL 1968315, *3 & n.3 (W.D. Ky. May 2, 2008) (citations omitted). In short, the Supreme Court has explicitly recognized that equity may preclude the EEOC from obtaining relief on behalf of an allegedly aggrieved individual, and judicial estoppel is an equitable doctrine. The court respectfully disagrees with other district courts which have held, without citing any controlling legal authority, that the EEOC is categorically immune from a judicial estoppel defense. *See, e.g.*, *EEOC v. Tobacco Superstores, Inc.*, No. 3:05CV00218-WRW, 2008 U.S. Dist. LEXIS 43923, 2008 WL 2328330, *8 (E.D. Ark. Jun. 4, 2008); *EEOC v. Digital Connections, Inc.*, No. 3:05-0710, 2006 U.S. Dist. LEXIS 69529, 2006 WL 2792219, *3 (M.D. Tenn. Sept. 26, 2006); *EEOC v. Apria Healthcare Grp., Inc.*, 222 F.R.D. 608, 613 (E.D. Mo. 2004). The court

will not permit the EEOC to help Ms. Starke, Ms. Payne or Ms. Timmons profit from their false assertions to the bankruptcy courts or otherwise allow the EEOC to denigrate the integrity of the judicial system.

This brings the court to Ms. Starke's final argument. As previously indicated, Ms. Starke argues "[s]ummary judgment is inappropriate against [her] because judicial estoppels [sic] is an affirmative defense that had to have been, but was not timely pleaded[.]" Resistance (docket no. 160), at 1.[3] Even if the court assumes Federal Rule of Civil Procedure 8(c)[4] required CRST to list judicial estoppel as an affirmative defense in its responsive pleadings, the Eighth Circuit Court of Appeals has "eschewed a literal interpretation of [Federal Rule of Civil Procedure 8(c)] that places form over substance . . . ." and clings to the principle that, "'[w]hen an affirmative defense is raised in the trial court in a manner that does not result in unfair surprise, technical failure to comply with Rule 8(c) is not fatal.'" *First Union Nat'l Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 622 (8th Cir. 2007) (quoting *Fin. Timing Publ'ns, Inc. v. Compugraphic Corp.*, 893 F.2d 936, 944 n.9 (8th Cir. 1990)). Here, Ms. Starke does not allege she suffered prejudice from CRST's failure to list judicial estoppel as an affirmative defense in its responsive pleadings, and the court discerns no prejudice to her. Ms. Starke knew or should have known of the possibility of the

3. The EEOC does not press this argument.

4. "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . estoppel . . . " Fed. R. Civ. P. 8(c).

judicial estoppel defense no later than December 30, 2008, when counsel for CRST asked her about her bankruptcy at her deposition. Ms. Starke certainly knew of CRST's intention to pursue a judicial estoppel defense soon enough to make a half-hearted attempt to reopen her bankruptcy proceeding. In any event, judicial estoppel is designed to protect the integrity of the judicial process and may be raised sua sponte by the court even if not raised as an affirmative defense by a party. *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 U.S. App. LEXIS 14496, 1998 WL 390834, *8 n.2 (4th Cir. 1998); *see, e.g., Weiss v. Allstate Ins. Co.*, 512 F. Supp. 2d 463, 468 (E.D. La. 2007) (holding defendant did not waive judicial estoppel defense by failing to include it in answer, where defendant raised the defense for the first time in a motion to summary judgment in part because the plaintiffs did not allege prejudice); *Lett v. Reliable Ruskin,* No. 1:05cv479-WHA, 2006 U.S. Dist. LEXIS 50541, 2006 WL 2056582, *4-*5 (M.D. Ala. Jul. 24, 2006) (reaching same conclusion on similar facts as *Weiss* and holding that "twenty days is more than enough notice for Lett to have prepared arguments to counter Rushkin's judicial estoppel claims"). The only two cases Ms. Starke cites in support of her waiver argument are clearly distinguishable. *Cf. United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993) (holding party was not permitted to raise judicial estoppel defense for first time on appeal); *Altman v. Altman,* 653 F.2d 755, 758 (3d Cir. 1981) (same).

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IV. CONCLUSION

The Motion (docket no. 144) is **GRANTED.** Ms. Starke is **DISMISSED WITH PREJUDICE** from the instant lawsuit. The EEOC is **BARRED** from seeking relief in this action on behalf of Ms. Payne and Ms. Timmons. The EEOC is **ORDERED** to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before May 14, 2009, at 5 p.m.** *See* Order (docket no. 66), *passim.*

Ms. Starke and the EEOC shall pay CRST's ordinary costs. CRST may file its request for costs **10 court days** after the disposition of the entire case. Now that CRST is a "prevailing party" as to Ms. Starke, 42 U.S.C. § 2000e-5(k), CRST may file an application for attorneys' fees from Ms. Starke within **20 court days** after disposition of the entire case.

IT IS SO ORDERED.

DATED this 13th day of May, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX M — SUMMARY JUDGMENT ORDER ON STATUTE OF LIMITATIONS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED MAY 11, 2009

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA,
CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARKE, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

May 11, 2009, Decided
May 11, 2009, Filed

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JUDGES: LINDA R. READE, CHIEF JUDGE, U.S. DISTRICT JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

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I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s Motion for Summary Judgment Based on Statute of Limitations and Other Grounds ("Motion") (docket no. 147).

II. RELEVANT PRIOR PROCEEDINGS [1]

A. Administrative Proceedings

1. Ms. Starke's Charge of Discrimination

On December 1, 2005, Plaintiff-Intervener Monika Starke ("Ms. Starke") presented a Charge of

1. A more complete recitation of the prior proceedings is set forth in the court's Order (docket no. 197). Once again, the claims of Plaintiffs-Interveners Monika Starke, Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Latesha Thomas and Nicole Ann Cinquemano are not at issue.

Discrimination ("Charge") to Plaintiff Equal Employment Opportunity Commission ("EEOC"). Ms. Starke alleged that her employer, Defendant CRST Van Expedited, Inc. ("CRST"), "discriminated against [her] on the basis of . . . sex . . . , in violation of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e *et seq.,]* as amended" ("Title VII"). Def.'s App'x at 2998. Ms. Starke alleged the following "particulars" in her Charge:

> I was hired by [CRST] on June 22, 2005 in the position of Truck Driver. Since my employment began with [CRST,] I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. . . . On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

Id. Further, Ms. Starke alleged that CRST "did not state why I was subjected to sexual harassment[,] which created a hostile work environment." *Id.*

Ms. Starke asked the EEOC to file her Charge and cross-file it with the Iowa Civil Rights Commission

("ICRC"). Pursuant to a work-sharing agreement,[2] the EEOC formally received the Charge on behalf of both agencies and deemed the Charge to be "initially instituted" with the ICRC. (In the work-sharing agreement, the EEOC and ICRC reciprocally designated each other as agents for receiving charges of unlawful employment practices.) The EEOC sent a copy of the Charge to the ICRC, notified the ICRC that the Charge "is to be initially investigated by the EEOC," *id.* at 3000, and began its investigation. The ICRC had waived its right to exclusive jurisdiction over charges initially instituted with it. Here, the ICRC filed the Charge on December 5, 2005 but apparently stayed its own investigation pending the EEOC proceedings.

2. *Ms. Starke's limitations period*

Because the EEOC deemed the Charge to be "initially instituted" with the ICRC, Ms. Starke's Charge was timely filed as to any alleged unlawful employment practice occurring on or after February 4, 2005, *i.e.*, any such practice occurring within 300 days of the filing of the Charge. In relevant part, Title VII's statute of limitations provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ,

---

2. For further explanation of the work-sharing agreement between the EEOC and the ICRC, see *Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 985-86 (N.D. Iowa 2003) (Bennett, C.J.).

> except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State . . . with authority to grant or seek relief from such practice . . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

42 U.S.C. § 2000e-5(e)(1); *see, e.g., Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359-60 n.8, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) ("If a charge has been initially filed with or referred to a state . . . agency, it must be filed with the EEOC within 300 days after the practice occurred . . . ."). An influential treatise explains

> there is a dual aspect to the Title VII limitations periods; they have a retrospective, as well as a prospective, aspect. In other words, not only must charges be filed within 180 (or 300) days after a discriminatory event, but also, as a general rule, the aggrieved party can only achieve redress for discriminatory acts which occurred 180 (or 300) days prior to the filing of charges.

4 Lex K. Larson, *Employment Discrimination* § 72.02, at 72-5 (2d ed. July 2008); *see, e.g., AMTRAK v. Morgan*, 536 U.S. 101, 109, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) ("An individual must file a charge within the statutory time period and serve notice upon the person against whom the charge is made. In a State that has an entity with

the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially filed a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice."); *Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 984-86 (N.D. Iowa 2003) (Bennett, C.J.) (discussing the ICRC and concluding that in Iowa an administrative charge is timely so long as it is filed within 300 days).

B. The EEOC's Complaint

On September 27, 2007, the EEOC filed the instant lawsuit on behalf of Ms. Starke "and a class of similarly situated female employees of [CRST] . . . ." Complaint (docket no. 2), at 1. Pursuant to 42 U.S.C. § 2000e-5(f)(1) and (3) and 42 U.S.C. § 1981a, the EEOC brings suit in its own name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Ms.] Starke and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint ("EEOC's Complaint") (docket no. 8), at 1.[3] The EEOC generally alleges that Ms. Starke and the other similarly situated women "were adversely affected . . . when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them . . . ." *Id.* Notably, the EEOC did *not* allege that CRST was engaged in "a pattern or practice" of illegal

3. The EEOC's Complaint, filed on November 16, 2007, corrected a typographical error in the Complaint. Ruling (docket no. 31), at 1 n.1.

sex-based discrimination or otherwise plead a violation of 42 U.S.C. § 2000e-6.

At present, the EEOC seeks monetary and equitable relief on behalf of approximately 150 allegedly aggrieved persons at the trial of this matter. The court refers to the "similarly situated female employees" who are referenced in the EEOC's Complaint as "allegedly aggrieved persons" and not as "class members." *See* Order (docket no. 197), at 9-10 (citing in part 42 U.S.C. § 2000e-5(f)(1) (referring to "[t]he person or persons aggrieved" and "the person aggrieved")). The phrase "allegedly aggrieved persons" comports with the language of § 2000e-5 and reflects the fact that the EEOC "may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule of Civil Procedure 23." *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 333-34, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) (footnote omitted). For example, the EEOC may pursue relief on behalf of a group of allegedly aggrieved persons "even though competing interests are involved," *id.* at 331, or even if there is "a huge variance in the nature and extent of the injuries suffered" within such group, *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002) (Posner, J.). The EEOC is "the master of its own case" and possesses statutory authority to proceed on behalf of allegedly aggrieved persons without their consent. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-92, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). Any limitation upon the EEOC to sue only on behalf of "similarly situated female employees" in this case was self-imposed.

C. Answer

On November 30, 2007, CRST filed an Answer and Affirmative Defenses (docket no. 11). On May 1, 2008, CRST filed an Amended Answer and Affirmative Defenses ("Answer") (docket no. 36) to assert an additional affirmative defense. CRST denies the substance of the EEOC's Complaint and asserts seven affirmative defenses, including waiver or release, failure to exhaust administrative remedies and "untimel[iness]." Answer at 2.

D. Motion

On February 13, 2009, CRST filed the Motion. On March 16, 2009, the EEOC filed a Resistance (docket no. 165). On March 31, 2009, CRST filed a Reply (docket no. 180). On April 14, 2009, the EEOC filed a Surreply (docket no. 192).

CRST requests oral argument on the Motion, but the court finds oral argument is not appropriate. The Motion is fully submitted and ready for decision.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler Corp.*,

409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g., Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

Appendix M

IV. THE MERITS

A. Arguments

1. Motion

In the Motion, CRST asks the court to bar the EEOC from seeking monetary and equitable relief on behalf of twelve women insofar as they allege they were sexually harassed before February 4, 2005, *i.e.*, more than 300 days prior to the filing of Ms. Starke's Charge on December 1, 2005. Specifically, CRST asks the court to dismiss the "claims" the EEOC is pursuing on behalf of (1) Ms. Antonia Aguilar, (2) Ms. Linda Austin, (3) Ms. Kelli Carney (in part), (4) Ms. Patrice Cohen, (5) Ms. Catherine Howard, (6) Ms. Geraldine Leach, (7) Ms. Margaret McCain, (8) Ms. Karen McCall, (9) Ms. Rachel Perhealth, (10) Ms. Faith Shadden (in part), (11) Ms. Linda Skaggs (in part) and (12) Ms. Priscilla Stephenson (collectively, "the twelve women"). Motion (docket no. 147-5), at 8. CRST asserts the "claims" of the twelve women fall outside of § 2000e-5's relevant 300-day statute of limitations. CRST concedes that all the other women the EEOC disclosed in this case generally may "piggyback" on Ms. Starke's timely charge, because they allege they were sexually harassed on or after February 4, 2005 and the EEOC has asserted a pattern or practice claim in this litigation. Brief in Support of Motion (docket no. 147-6), at 9 (citations omitted); *cf. Gen. Tel.*, 446 U.S. at 331 ("Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable."); *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976) (permitting

the EEOC to use a timely filed charge of discrimination as a "jurisdictional springboard").

In the alternative, CRST asks the court to bar the EEOC from seeking relief on behalf of the twelve women under its inherent power to impose discovery sanctions. CRST argues:

> The parties have focused virtually all of their discovery on the period from January 1, 2005 to October 15, 2008. [The] EEOC should not be permitted, after discovery is closed, to attempt to extend the period in suit by several years. Moreover, the claims of only 13 [sic] of the 153 [allegedly aggrieved women] arose in whole or in part prior to February 4, 2005, and such a small number of sporadic claims over several years provides no basis at this late stage for EEOC to [seek relief] as far as 1997, when the earliest of the [women's] claims arose.

Id. at 10.

Finally, CRST presents the court with a number of independent reasons why the court should bar the EEOC from seeking relief on behalf of Mss. Austin, Aguilar, Cohen, Leach, McCain, Shadden and Skaggs. Among other things, CRST argues (1) Mss. Aguilar, Leach, McCain, Shadden and Skaggs did not suffer severe or pervasive sexual harassment; (2) Mss. Cohen, Leach and McCain did not promptly report their allegations of sexual harassment to CRST; (3) CRST took prompt remedial

action with respect to Ms. Shadden's allegation of sexual harassment; and (4) Mss. Austin, McCall and Cohen filed timely charges of discrimination with the EEOC but failed to file suit within ninety days after the EEOC issued them right-to-sue letters.

2. *Resistance*

The EEOC claims it is not bound by any statute of limitation. The EEOC opines that "[t]his is a case brought by the [EEOC] alleging a pattern or practice of tolerating a hostile work environment based on sexual harassment" that CRST wrongly construes "as if it were a single claim of discrimination brought by a private individual." Resistance at 4. The EEOC maintains it is immune from § 2000e-5's statute of limitations and may seek relief for victims of a pattern or practice of employment discrimination "as far back as the evidence warrants." *Id.* at 6.

The EEOC "expects to prove that the pattern or practice [of tolerating sexual harassment] extended at least back to 1997 when . . . [Ms.] Janet Boot was sexually harassed in the same manner as were later victims." *Id.* The EEOC characterizes the pattern or practice of sexual harassment at CRST as forming a "continuing violation" as contemplated in *Morgan*. The EEOC thus concludes no limitations period may be enforced "so long as one incident included in the hostile work environment occurred within the statutory period." *Id.* at 7.

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The EEOC concedes that a number of district courts "have refused to include claimants beyond the 300 days" because of (1) "the language of [§ 2000e-5]" and (2) "the policies supporting repose." *Id.* The EEOC maintains these district courts were wrong. The EEOC avers that any distinction between § 2000e-6 and § 2000e-5 "is not useful" because, in its view, both statutes authorize pattern or practice cases and require "identical" elements of proof. *Id.* Without citing any controlling legal authority, the EEOC concludes that "there is no difference between pleading either statute." *Id.* at 11. The EEOC maintains that the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (S 181), 123 Stat. 5 (Jan. 29, 2009) ("Ledbetter Act") evinces a generalized Congressional intent that "Title VII is to be broadly interpreted to reach systems of discrimination . . . without artificial reliance on the charge filing periods to exclude victims of those systems of discrimination." *Id.* at 11.

The EEOC resists CRST's alternative argument that the court impose a discovery sanction upon the EEOC and bar the EEOC from seeking relief for the twelve women. The EEOC states: "CRST's claim that [the] EEOC has added these early claims at a 'late stage,' because it agreed to focus discovery on the period after January 1, 2005, is simply false." *Id.* at 6. The EEOC represents to the court that it "always told" CRST that it intended to pursue claims as far back into the past as possible. *Id.* The EEOC concludes its "tactical decision that it did not have the resources to attempt to locate all of the potential victims of CRST's conduct does not preclude it from proving that the discriminatory environment existed and

that identified victims are entitled to compensation." *Id.* (footnote omitted).

Finally, the EEOC resists all of CRST's independent reasons why the claims of Mss. Aguilar, Cohen, Leach, McCain, Shadden and Skaggs fail on their merits. The EEOC variously argues (1) the twelve women suffered severe and pervasive sexual harassment; (2) the twelve women promptly reported the harassment they suffered; (3) CRST failed to take prompt remedial action with respect to Ms. Shadden's allegation of sexual harassment; and (4) the failure of any "class member" to file her own lawsuit after receiving a right-to-sue letter from the EEOC does not bar the EEOC from seeking relief on her behalf at a later date.

3. Reply

In Reply, CRST reasserts many of the arguments in its Motion. CRST maintains that the EEOC's construction of § 2000e-5(e)(1) is absurd, because it would permit the EEOC to revive stale claims with impunity. Further, CRST argues the EEOC's arguments are misplaced. Drawing upon arguments in its contemporaneously filed "Motion for Summary Judgment on EEOC's Pattern or Practice Claim" (docket no. 150) ("Pattern or Practice Motion"), CRST maintains the EEOC has failed to present sufficient evidence to establish that CRST has engaged in "a pattern or practice [of tolerating sexual harassment]--much less one that extends back earlier than February 4, 2005." Reply at 6. Absent proof of a pattern or practice of tolerating sexual harassment, the entire foundation of the EEOC's Resistance collapses.

Even if the court were to deny the Pattern or Practice Motion, CRST insists that the EEOC is "cavalierly dismiss[ing]" important distinctions between § 2000e-5 and § 2000e-6. CRST points out that, by its very terms, § 2000e-5 contains a limitations period. CRST maintains there is no textual support within § 2000e-5 for the EEOC's attempt to seek relief beyond the 300-day limitations period. CRST maintains *Morgan* is largely inapplicable to the case at bar, because each of the twelve women alleges different harassment by different harassers at different workplaces. CRST argues, however, that "given [the] EEOC's inability to muster any proof of a pattern or practice predating February 4, 2005, there is no need for the Court to address th[ese] [alternative] legal issue[s]." *Id.* at 9.

4. Surreply

The EEOC's arguments in its Surreply solely concern its ability to pursue monetary and other relief at trial on behalf of a thirteenth woman, Ms. Belinda Bedford. The court presents these arguments in Part V *infra*.

B. Analysis

1. Holding

On April 30, 2009, the court granted the Pattern or Practice Motion. *See* Order (docket no. 197), *passim*. After pointing out ambiguities in the EEOC's Complaint, the court "assume[d] without deciding that at least one of two legal principles is true: either (1) § [2000e-5] somehow

permits the EEOC to pursue a pattern or practice claim and thereby render § [2000e-6] a mere redundancy in the law or (2) the EEOC has constructively amended its complaint to assert a § [2000e-6] claim against CRST in this lawsuit in addition to its § [2000e-5] claim." *Id.* at 26. "In other words, the court assume[d] without deciding that this is a sexual harassment pattern or practice case." *Id.* The court canvassed the summary judgment record and held, as a matter of law, that the EEOC had presented the court with insufficient admissible evidence for a reasonable jury to find that CRST has engaged in a pattern or practice of tolerating sexual harassment.

The pivotal issue before the court, then, is whether Title VII's statute of limitations, 42 U.S.C. § 2000e-5(e)(1), applies when the EEOC brings suit in its own name on behalf of a group of allegedly aggrieved persons under 42 U.S.C. § 2000e-5 and there is insufficient evidence of a pattern or practice of unlawful employment discrimination. The EEOC's entire Resistance is premised upon the proposition that it is immune from § 2000e-5's statute of limitations in this case *because* it has a viable pattern or practice claim against CRST. In other words, the EEOC assumes that its pattern or practice allegations provide the requisite legal justification to revive these otherwise stale claims; the EEOC apparently assumes that, absent a showing of a pattern or practice of employment discrimination, § 2000e-5 bars the EEOC from seeking relief on behalf of the twelve women.

In light of the court's ruling on the Pattern or Practice Motion, the EEOC's fundamental premise that it has a

viable pattern or practice claim against CRST is false. For this reason, the court shall grant the Motion as to the twelve women as unresisted. The EEOC has not cited any controlling legal authority that indicates it is not bound by any statute of limitations when pursuing relief on behalf of a group of allegedly aggrieved persons under § 2000e-5 absent a showing of a pattern or practice of unlawful employment discrimination. The Ledbetter Act has no relevance here. Congress enacted the Ledbetter Act "to clarify that a discriminatory compensation decision or other practice . . . . occurs each time compensation is paid to the discriminatory compensation decision or other practice[.]" 123 Stat. at 5. There is no indication Congress intended the Ledbetter Act to serve as a trump card that the EEOC might use to supersede all statutes of limitations in our nation's various civil rights acts.

In sum, the court holds that the EEOC is barred from seeking relief at trial on behalf of the twelve women insofar as they allege that they were sexually harassed before February 4, 2005.[4] The court need not reach CRST's argument concerning the appropriateness of a discovery sanction. Although CRST presents the court with legal reasons to bar the EEOC from seeking relief at trial on behalf of Mss. Shadden and Skaggs insofar as they allege that they were sexually harassed on or after February

4. There is one exception to this bright-line ruling. As explained in Part IV.B.2.b.i *infra*, CRST does not ask the court to bar the EEOC from seeking relief on Ms. Carney's behalf for her allegation that Mr. Raymond Coplan sexually harassed her in early 2005. CRST assumes *Morgan's* continuing violation doctrine saves this portion of Ms. Carney's claim.

4, 2005, the court shall deny this portion of the Motion without prejudice. The court finds it more appropriate to consider this portion of the Motion in conjunction with CRST's pending motions for summary judgment on the merits of the various allegedly aggrieved persons' claims.

Accordingly, the court shall grant in part and deny in part the Motion.

2. Alternate holding

Even if the court did not deem the Motion to be unresisted, the court would nonetheless bar the EEOC from seeking relief at trial on behalf of the twelve women insofar as they allege that they were sexually harassed before February 4, 2005. It is the opinion of the court that (1) the EEOC generally may not resurrect dead claims and (2) the continuing violation doctrine largely does not apply in this case.

a. The EEOC generally may not resurrect dead claims

The Supreme Court has not directly addressed whether Title VII's statute of limitations binds the EEOC, and the circuit courts of appeals are silent.[5] Matters are

5. The Supreme Court reserved ruling on a related issue. *See Morgan*, 536 U.S. at 115 n.9 ("We have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here."); *see also Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 878 (D. Minn. 1993) ("If Plaintiffs establish that Eveleth

messy at the district court level. Other district courts have "blurred the line between class-wide claims brought pursuant to § [2000e-5] and pattern-or-practice claims brought pursuant to § [2000e-6]." *United States EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1143 (D. Nev. 2007). As a consequence, such district courts offer widely divergent analyses that are impossible to reconcile or even tidily summarize. All that may be said is that, whereas some district courts appear to indicate the EEOC may be subject to a statute of limitations, *see, e.g., EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 659-60 (E.D. Va. 2008); *EEOC v. Wyndham Worldwide Corp.*, No. C07-1531RSM, 2008 U.S. Dist. LEXIS 83558, 2008 WL 4527974, *6-*8 (W.D. Wash. Oct. 3, 2008); *EEOC v. KCD Constr., Inc.*, No. 05-2122(DSD/SRN), 2007 U.S. Dist. LEXIS 28061, *10 (D. Minn. Apr. 16, 2007); *EEOC v. GLC Rests., Inc.*, No. CV-05-0618-PCT-DGC, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224, *2-*3 (D. Ariz. Oct. 26, 2006); *EEOC v. Custom Cos.*, Nos. 02-C-3768 & 03-C-2293, 2004 U.S. Dist. LEXIS 5950, 2004 WL 765891, *2-*11 (N.D. Ill. Apr. 7, 2004); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 544-50 (W.D. Va. 2001); *EEOC v. Harvey L. Walner & Assocs.*, No. 95-1355, 1995 U.S. Dist. LEXIS 11239, 1995 WL 470233, *3-*6 (N.D. Ill. Aug. 7, 1995), *aff'd on other grounds*, 91 F.3d 963 (7th Cir. 1996); *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1258-62 (M.D. Ala. 1980), other district courts appear

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Mines maintained a company-wide pattern or practice of sexual harassment both before and after December 30, 1983, Eveleth Mines will be liable for acts of sexual harassment reaching back to the commencement of the policy."), *aff'd on other grounds*, 130 F.3d 1287, 1291-93 (8th Cir. 1997).

to grant the EEOC the power to resurrect stale claims, *see, e.g., EEOC v. Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1022 (N.D. Ill. 2009); *EEOC v. Worthington, Moore & Jacobs, Inc.*, 582 F. Supp. 2d 731, 737-38 (D. Md. 2008); *United States EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1136 (D. Nev. 2007); *EEOC v. L.A. Weight Loss*, 509 F. Supp. 2d 527, 534-36 (D. Md. 2007); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 966-69 (N.D. Ill. 2001); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1083-88 (C.D. Ill. 1998).

After surveying these district court cases, the court finds the better reasoned authority holds that Title VII generally does not grant the EEOC the power to resurrect otherwise stale claims of unlawful employment discrimination.[6] The plain language of § 2000e-5 contemplates that the "charge shall be filed by *or on behalf of the person aggrieved* within three hundred days after the alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1) (emphasis added). Section 2000e-5 makes no exception for the EEOC, even though it clearly contemplates EEOC enforcement actions. Any ambiguity in the statute is the consequence of early judicial decisions, which granted the EEOC the ability to use an individual charge of discrimination as "a jurisdictional springboard"

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6. For example, *Ceisel* reasoned *EEOC v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006) called into question *Custom* and *Walner*. *Ceisel* reads too much into *Sidley*, which simply applied *Waffle House* and held that an individual's failure to file a timely charge of discrimination does not, by itself, prevent the EEOC from seeking monetary relief on her behalf. 437 F.3d at 696. *Sidley* did not address the limitations issue presented here.

but failed to discuss the statute of limitations problems that might arise if courts were to allow the EEOC to recover for non-charging parties with stale claims. *See, e.g., Gen. Elec.*, 532 F.2d at 364 (cited with approval in *Gen. Tel.*, 446 U.S. at 331 ("Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.")).

The EEOC's proposed construction of its powers is inconsistent with its statutory mandate. The district court in *Burlington* aptly observed:

> The EEOC's special statutory mandate does not entitle it to "expand substantive rights, such as reviving stale claims" that would not otherwise be actionable under Title VII. On the contrary, the EEOC's ability to secure enforcement of Title VII on behalf of the public is primarily served through its ability to secure injunctive relief, not bootstrapping individual damage claims into the EEOC's enforcement action.

536 F. Supp. 2d at 659 (citation omitted); *see also Bemis*, 279 F.3d at 421 ("The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself and putting them to the bother of suing separately.")

To adopt the EEOC's construction of Title VII would permit the EEOC to destroy all principles of repose and force employers to defend against zombie-like claims from the distant past. As the district court in *Sears*

recognized, the Supreme Court counseled against any such construction of § 2000e-5 in *Occidental Life:*

> The [Supreme] Court implied in dicta that, unlike the 180-day period of [§] 2000e-5(f)(1), the 180-day period of [§] 2000e-5(e) is intended to be a limitations period. [T]he Court went on to state:
>
> "Congress did express concern for the need of time limitations in the fair operation of the Act, but that concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator. The bills passed in both the House and the Senate contained short time periods within which charges were to be filed with the EEOC and notice given to the employer. And the debates and reports in both Houses made evident that the statute of limitations problem was perceived in terms of these provisions, rather than in terms of a later limitation on the EEOC's power to sue. That perception was reflected in the final version of the 1972 Act, which requires that a charge must be filed with the EEOC within 180 days of the alleged violation of Title VII . . . .
>
> "The fact that the only statute of limitations discussions in Congress were directed to the period preceding the filing of an initial charge is wholly consistent with the Act's

> overall enforcement structure a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body."
>
> While this Court is mindful of the fact that the Court possibly had in mind only a limitations period for charges filed by individuals, the message is clear that in *Occidental Life* the majority of the Court in dicta recognized the congressional intent that [§] 2000e-5(e) is an example of a statute of limitations period applicable to suits filed under [§] 2000e-5. This Court is of the opinion that said period is also applicable to suits initiated by the EEOC . . . .

Sears, 490 F. Supp. at 1260 (footnote omitted) (quoting *Occidental Life*, 432 U.S. at 371-72); *see, e.g., Wyndham Worldwide*, 2008 U.S. Dist. LEXIS 83558, 2008 WL 4527974, at *6-*8 (applying statute of limitations to the EEOC and holding that the EEOC may not "resurrect[] stale claims" in absence of pattern or practice claim); *GLC Rests.*, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224, at *2-*3 (similar).

b. The continuing violation doctrine is largely inapplicable

Morgan is largely inapplicable to the case at bar, because the EEOC has not presented evidence to show that "all acts which constitute [a] claim are part of the same unlawful employment practice and at least one act falls within the time period." 536 U.S. at 122. As previously indicated, "there is nothing in the record which a reasonable jury might cobble together to show [CRST's] failures were part of a *pattern or a practice* of tolerating sexual harassment instead of merely isolated or sporadic failures over the course of four (or perhaps twelve) years." Order (docket no. 197), at 62 (emphasis in original). At most, *Morgan* only applies in a limited respect as to the individual "claims" of harassment that the EEOC presses in this action. *Morgan* does not permit the EEOC to "use some [allegedly aggrieved persons'] timely charges to support other [allegedly aggrieved persons'] entirely untimely claims." *GLC Rests.*, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224, at *2.

Therefore, *Morgan* certainly does not apply to the ability of the EEOC to seek relief at trial on behalf of nine women, Mss. Aguilar, Austin, Cohen, Howard, Leach, McCain, McCall, Perhealth, and Stephenson. None of these women allege any harassment on or after February 4, 2005. Ms. Aguilar alleges sexual harassment in 2004; Ms. Austin in 2001; Ms. McCain in 2003; Ms. Cohen in 2003 and 2004; Ms. Howard in 2004; Ms. Leach in 2004 and January of 2005; Ms. McCall in 2004; Ms. Perhealth in January of 2005; and Ms. Stephenson in 1999. Accordingly, the court must grant the Motion as to these nine women.

Appendix M

Matters are somewhat more complicated with respect to the remaining three women, Mss. Carney, Shadden and Skaggs. Each of these three women alleges she was sexually harassed before *and* after February 4, 2005. CRST asks the court to bar the EEOC from resurrecting that portion of each woman's "claim" occurring before such date; CRST does not move for summary judgment on limitations grounds for any conduct occurring on or after February 4, 2005. The court discusses each woman's allegations, in turn, and analyzes them under *Morgan* separately.

i. Ms. Carney

Ms. Carney worked for CRST from September of 2004 to April of 2005, when she quit and went to work for Swift, Inc. She returned to CRST from June 15, 2005 to June 30, 2005. She left CRST on June 30, 2005 after entering a hospital for "pregnancy related issues." Def.'s Statement of Undisputed Material Facts at 114. Ms. Carney alleges she was sexually harassed by three men while she worked for CRST during these two stints: Messrs. Joe McCarthy, Raymond Coplan and Chris Evans.

Ms. Carney alleges her trainer Mr. McCarthy harassed her in late 2004 by promising to promote her to co-driver status and pay for many of her expenses if she had sexual relations with him. Ms. Carney and Mr. McCarthy had sexual relations on a daily basis in the cab of the semi-truck they shared. Ms. Carney also spent a week with Mr. McCarthy at his home in Boston, Massachusetts and repeatedly had sex and dinner with him.

Appendix M

Ms. Carney alleges Mr. Evans harassed her in late 2004. Mr. Evans was paired with her as a co-driver. He did not offer her money for sex. He would rub her shoulders, ask her why she would not have sex with an older man and told her he could "rock [her] world." Def.'s App'x at 627.

Ms. Carney alleges Mr. Coplan harassed her for a period of a month, apparently before and after February 4, 2005. When Mr. Coplan first boarded the truck, he told Ms. Carney: "Watch, I'm going to fuck you." *Id.* at 623. On their second night in the truck, he insisted that she sleep in his bed and, if she did not, he would leave her on the side of the road. That night and every night thereafter for the next month Mr. Coplan held Ms. Carney down and raped her. He threatened to kill her if she told CRST about his behavior.

CRST only moves for summary judgment with respect to Ms. Carney's allegations of sexual harassment against Messrs. McCarthy and Evans. CRST does not move for summary judgment with respect to Ms. Carney's allegations of sexual harassment against Mr. Coplan, because she alleges he continuously sexually harassed her before and after February 4, 2005.

Applying *Morgan*, the court agrees with CRST's analysis. There is no discernible connection between the harassment of Ms. Carney by Messrs. McCarthy and Evans, on the one hand, and the harassment of Ms. Carney by Mr. Coplan, on the other. In other words, there is no evidence the actions of the three men were all "part of the same unlawful employment practice." 536 U.S. at

122. Each of the three sets of allegations by Ms. Carney involves different alleged harassers, different workplaces and different circumstances. At most, the EEOC has shown anecdotal, isolated discriminatory events. *Cf. Tademe v. St. Cloud State Univ.*, 328 F.3d 982, 988-89 & n.4 (8th Cir. 2003) (applying *Morgan* and concluding that allegations were "entirely anecdotal and at best shows isolated discriminatory events" not a pattern or practice of discrimination or anything else that might fall within the ambit of the continuing violation doctrine) (citing in part *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 952-53 (8th Cir. 1999) (affirming dismissal of a pattern or practice claim under the federal age discrimination act because the EEOC proved nothing more than anecdotal discriminatory acts)); *Wyndham Worldwide*, 2008 U.S. Dist. LEXIS 83558, 2008 WL 4527974, at *6-*8 (declining to apply *Morgan* across allegedly aggrieved persons); *GLC Rests.*, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224, at *2-*3 (similar).

Accordingly, the court shall grant the Motion as to Ms. Carney. The EEOC may seek relief for Ms. Carney only insofar as she alleges she was sexually harassed by Mr. Coplan. The court expresses no view as to whether harassment by Messrs. McCarthy and Evans is admissible at trial.

ii. Ms. Shadden

Ms. Shadden worked for CRST from October of 2004 through December of 2004. She was rehired in May of 2006 and presently works for CRST. Ms. Shadden worked for a number of other companies before CRST rehired her.

Appendix M

Ms. Shadden claims an unnamed co-driver sexually harassed her in 2004. He "was very abusive in a sexual way," engaged in "sex talk," asked her if she "had . . . ever experienced a sexual relationship or any other type of relationship with a black man," put his hand on her thigh and touched her in her "bra area." Def.'s App'x at 2596-97.

Ms. Shadden also alleges that, after she returned to CRST in 2006, she endured repeated sexual advances. Three other drivers "hit on [her] once." *Id.* at 2602. Ms. Shadden also claims Mr. Carl Bowling, a student driver whom she was training, sexually harassed her in late April and early May of 2007. She alleges Mr. Bowling asked her to pretend to be his girlfriend around other men, asked her if she would get into bed with him and, on one occasion, jumped into her bed and refused to leave. Mr. Bowling frightened Ms. Shadden because of his persistence and his laughter. Also, his conduct grew more aggressive over time.

CRST does not move for summary judgment on limitations grounds with respect to the post-February 4, 2005 conduct of Mr. Bowling and the three other men. CRST only moves for summary judgment with respect to Ms. Shadden's allegations of sexual harassment against the unnamed co-driver in 2004.

Applying *Morgan*, the court agrees with CRST's analysis. There is no discernible connection between the harassment of Ms. Shadden by the unnamed co-driver, on the one hand, and the harassment of Ms. Shadden by Mr. Bowling and the other three men on the other. In other words, there is no evidence the actions were all "part of the

same unlawful employment practice." *Morgan*, 536 U.S. at 122. Each of the two sets of allegations by Ms. Carney involves different alleged harassers, different workplaces and different circumstances. At most, the EEOC has shown anecdotal, isolated discriminatory events. *Cf. Tademe*, 328 F.3d at 988-89 & n.4; *Wyndham Worldwide*, 2008 U.S. Dist. LEXIS 83558, 2008 WL 4527974, at *6-*8 (declining to apply *Morgan* across allegedly aggrieved persons); *GLC Rests.*, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224, at *2-*3 (similar).

Accordingly, the court shall grant the Motion in part as to Ms. Shadden. The EEOC may seek relief for Ms. Shadden only insofar as she alleges she was sexually harassed by Mr. Bowling and the three other men. The court expresses no view as to whether harassment by the unnamed co-driver is inadmissible at trial.

iii. Ms. Skaggs

Ms. Skaggs worked at CRST from February of 2003 through May of 2005. Ms. Skaggs alleges her first trainer, Mr. Dartmouth Robinson, and her last co-driver, Mr. Eules "J" Baker, Jr., sexually harassed her.

Ms. Skaggs drove with Mr. Robinson on one day on February 21, 2003. She claims Mr. Robinson told Ms. Skaggs she could sleep in the nude if she wanted or could sit with him up front nude if she liked. He mentioned that other female drivers would take their shirts off and flash other drivers.

Appendix M

Ms. Skaggs rode with Mr. Baker for three weeks between March 31, 2005 and April 17, 2005. Mr. Baker bragged about his sexual prowess and experiences, made perverted comments on a daily basis and he propositioned her for sex five times. He bragged he could "fuck [her] brains out" and "make [her] have more than one orgasms [sic], more than anybody else [she had] ever known." Def.'s App'x at 2868. He also offered to pay her for $ 100 to have sex with him in Reno, Nevada.

CRST only moves for summary judgment with respect to Ms. Skaggs's allegations of sexual harassment against Mr. Robinson. CRST does not move for summary judgment on limitations grounds with respect to Ms. Skaggs's allegations of sexual harassment against Mr. Baker, because she alleges he sexually harassed her after February 4, 2005.

Applying *Morgan*, the court agrees with CRST's analysis. There is no discernible connection between the harassment of Ms. Skaggs by Mr. Robinson, on the one hand, and the harassment of Ms. Skaggs by Mr. Baker, on the other. In other words, there is no evidence the actions of the two men were all "part of the same unlawful employment practice." 536 U.S. at 122. The two instances of sexual harassment involve different alleged harassers, different workplaces and different circumstances. At most, the EEOC has shown anecdotal, isolated discriminatory events. *Cf. Tademe*, 328 F.3d at 988-89 & n.4; *Wyndham Worldwide*, 2008 U.S. Dist. LEXIS 83558, 2008 WL 4527974, at *6-*8 (declining to apply *Morgan* across allegedly aggrieved persons); *GLC Rests.*, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224, at *2-*3 (similar).

Accordingly, the court shall grant the Motion in part as to Ms. Skaggs. The EEOC may seek relief for Ms. Skaggs only insofar as she alleges she was sexually harassed by Mr. Baker. The court expresses no view as to whether harassment by Mr. Robinson is inadmissible evidence at trial.

C. Disposition as to the Twelve Women

In sum, the court shall bar the EEOC from seeking any legal relief at trial on behalf of Mss. Aguilar, Austin, Cohen, Howard, Leach, McCain, McCall, Perhealth and Stephenson. Furthermore, the court shall bar the EEOC from seeking relief at trial on behalf of Mss. Carney, Shadden and Skaggs insofar as they allege they were sexually harassed before February 4, 2005, except that the EEOC may seek relief at trial on behalf of Ms. Carney for any alleged sexual harassment suffered at the hands of Mr. Coplan.

The court shall deny the Motion in all other respects. The court shall consider CRST's alternative arguments for dismissal with respect to Mss. Shadden and Skaggs in conjunction with CRST's pending motions for summary judgment on the merits of the allegedly aggrieved persons' allegations of sexual harassment.

Appendix M

V. MS. BEDFORD

A. Arguments

In its Motion, CRST also asks the court to bar the EEOC from seeking relief for a thirteenth woman, Ms. Belinda Bedford. Ms. Bedford is not similarly situated to the other twelve women in the Motion, however, because all of her allegations of sexual harassment occurred after February 4, 2005. Ms. Bedford worked for CRST from July 19, 2007 through August 11, 2007. She alleges Mr. Steve Hall, a fellow driver, sexually harassed her for approximately one week. On August 12, 2007, Ms. Bedford filed a timely charge of discrimination with the EEOC. The EEOC dismissed the charge and issued her a right-to-sue letter on December 27, 2007.

In the Motion, CRST claims that Ms. Bedford did not file suit within ninety days of the issuance of her right-to-sue letter or intervene in the instant lawsuit. CRST concludes the EEOC is barred from seeking relief for her. In the alternative, CRST claims Ms. Bedford's claim must fail on its merits because she did not promptly report the alleged sexual harassment to CRST.

In its Resistance, EEOC points out Ms. Bedford's "claim was apparently included in this motion in error" because she clearly alleges she was sexually harassed after February 4, 2005. Resistance at 14. The EEOC also claims CRST is wrong about the facts; the EEOC presents evidence to show Ms. Bedford filed a Title VII suit against CRST in the United States District Court

for the Western District of Oklahoma on March 26, 2008 ("the Oklahoma suit"). The EEOC notes Ms. Bedford voluntarily dismissed the Oklahoma suit on July 23, 2008 with intent to proceed in the instant action as a "class member." Addressing CRST's alternative argument, the EEOC argues Ms. Bedford was not required to report her harassment sooner than she did.

In Reply, CRST repeats the arguments in its Motion but admits the EEOC's factual allegations about the Oklahoma suit. CRST maintains the EEOC may not seek relief on behalf of Ms. Bedford at trial. CRST opines Ms. Bedford should have asked for leave to intervene in the instant lawsuit instead of voluntarily dismissing the Oklahoma suit without prejudice.

In Surreply, the EEOC presents the court with an affidavit from Ms. Bedford's attorney in the Oklahoma suit, Attorney Amanda Farahany. Attorney Farahany states she advised Ms. Bedford to voluntarily dismiss her case because the EEOC could seek relief on her behalf in the instant case. Attorney Farahany maintains the voluntary dismissal of the Oklahoma suit was not intended as a waiver of Ms. Bedford's rights.

B. Analysis

Neither party cites any cases precisely on point. CRST cites four cases in support of its position that Ms. Bedford's actions bar the EEOC from seeking relief on her behalf in this case. All four cases are distinguishable, however, and have nothing to do with the issue before the

court. *See, e.g., South Dakota v. United States DOI*, 317 F.3d 783, 785 (8th Cir. 2003) (generally discussing rules of intervention); *Price Digital Equip. Co.*, 846 F.2d 1026, 1027 (5th Cir. 1998) (generally discussing the effect of a voluntary dismissal); *Brown v. Hartshorne Public School Dist. #1*, 926 F.2d 959, 961 (10th Cir. 1991) (same). Indeed, the closest governing authority on point would appear to run counter to CRST's position. *Cf. Anderson v. Unisys Corp.*, 47 F.3d 302, 308 (8th Cir. 1995) (holding that any claimant who files an administrative charge and obtains a right-to-sue letter from the EEOC must file a timely lawsuit to preserve her cause of action). Absent citation to legal authority on point, the court declines to bar the EEOC from seeking relief for Ms. Bedford because she filed a lawsuit and dismissed it voluntarily to allow the EEOC to seek relief on her behalf. *See* LR 56.b; LR 7.e; LR 1.f.

Accordingly, the court shall deny the motion in part with respect to Ms. Bedford. The court shall consider CRST's alternative arguments for dismissal with respect to Ms. Bedford in conjunction with CRST's pending motions for summary judgment on the merits of the allegedly aggrieved persons' allegations of sexual harassment.

VI. CONCLUSION

The Motion (docket no. 147) is **GRANTED IN PART AND DENIED IN PART.** The court **BARS** the EEOC from seeking relief at trial on behalf of (1) Ms. Antonia Aguilar, (2) Ms. Linda Austin, (3) Ms. Patrice Cohen, (4)

Ms. Catherine Howard, (5) Ms. Geraldine Leach, (6) Ms. Margaret McCain, (7) Ms. Karen McCall, (8) Ms. Rachel Perhealth, and (9) Ms. Priscilla Stephenson. Furthermore, the court **BARS** the EEOC from seeking relief at trial on behalf of (1) Ms. Kelli Carney, (2) Ms. Faith Shadden and (3) Ms. Linda Skaggs insofar as they allege they were sexually harassed before February 4, 2005, except that the EEOC may seek relief at trial on behalf of Ms. Carney for any alleged sexual harassment suffered at the hands of Mr. Coplan. The court shall rule on CRST's alternative arguments to bar the EEOC from seeking relief at trial on behalf of Mss. Bedford, Shadden and Skaggs when it rules on CRST's pending motions for summary judgment on the merits of the allegedly aggrieved persons' allegations of sexual harassment. The EEOC is ordered to file an updated list of allegedly aggrieved persons for which it intends to seek relief at trial **on or before May 12, 2009, at 5 p.m.** *See* Order (docket no. 66), *passim.*

IT IS SO ORDERED.

DATED this 11th day of May, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX N — EXCERPT FROM EEOC'S RESISTANCE TO CRST'S MOTIONS IN LIMINE IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED MAY 11, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-00095-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARK, LATESHA THOMAS, AND NICOLE ANN CINQUEMANO,

Plaintiff-Interveners,

v.

CRST VAN EXPEDITED, INC.,

Defendant.

EEOC'S RESISTANCE TO CRST'S MOTIONS IN LIMINE

Appendix N

The Court has now dismissed EEOC's pattern or practice claim. April 30, 2009 Order, Doc. No. 197. EEOC will therefore present separate claims for each of the 35 women against whom CRST has not moved for summary judgment, and for each of the remaining women whose claims are not dismissed pursuant to CRST's motions. The burdens of proof will be different than if EEOC were arguing a pattern or practice claim, but the evidence will be substantially similar. EEOC will be required to prove for each woman that she was subjected to sexually offensive conduct, which she found unwelcome, because of her sex. EEOC will also be required to prove that the conduct was severe or pervasive, that it would have offended a reasonable person, and that Defendant CRST failed to take prompt and effective action to end the harassment. *See* Eighth Circuit Pattern Jury Instruction 5.43. Evidence will include the totality of the hostile environment to which each woman was subjected, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993), and the effectiveness of CRST's policies in preventing and redressing such harassment.[1]

Section I below discusses the case law in regard to motions in limine and argues that many sections of CRST's

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1. The relevance of evidence has been extensively argued in other motions. *See* Motions for Summary Judgment (Doc Nos. 144-150, 162-166, 168); EEOC Motion to Compel and for Sanctions (Doc. Nos. 127, 138); EEOC Motion to Compel (Doc. Nos. 104, 123); and CRST Motion to Strike (Doc. Nos. 171-172, 187). Many of CRST's and EEOC's arguments are repetitive of those previously made. EEOC will therefore make its arguments here as briefly as possible.

Appendix N

Motion seek overly broad exclusions of evidence. Section II addresses the Sections of CRST's motions that EEOC does not contest. Section III argues that all of CRST's remaining requests should be denied.

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APPENDIX O — SUMMARY JUDGMENT ORDER ON EEOC'S PATTERN AND PRACTICE CLAIM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED APRIL 30, 2009

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARKE, LATESHA THOMAS and NICOLE ANN CINQUEMANO,

Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

April 30, 2009, Decided
April 30, 2009, Filed

Appendix O

JUDGES: LINDA R. READE, CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

[TABLE OF CONTENTS INTENTIONALLY OMITTED]

I. INTRODUCTION

The matter before the court is Defendant CRST Van Expedited, Inc.'s "Motion for Summary Judgment on EEOC's Pattern and Practice Claim" ("Motion") (docket no. 150).

II. PROCEDURAL BACKGROUND

A. Administrative Proceedings

1. Ms. Starke files the Charge

On December 1, 2005, Plaintiff-Intervener Monika Starke ("Ms. Starke") presented a Charge of Discrimination ("Charge") to Plaintiff Equal Employment Opportunity Commission ("the EEOC"). Ms. Starke alleged that her employer, Defendant CRST Van Expedited, Inc. ("CRST"), "discriminated against [her] on the basis of . . . sex . . . , in violation of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e *et seq.*,] as amended" ("Title VII").

Def.'s App'x at 2998. Ms. Starke alleged the following "particulars" in her Charge:

> I was hired by [CRST] on June 22, 2005 in the position of Truck Driver. Since my employment began with [CRST,] I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. . . . On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

Id. Further, Ms. Starke alleged that CRST "did not state why I was subjected to sexual harassment[,] which created a hostile work environment." *Id.*

2. The EEOC processes the Charge

Ms. Starke asked the EEOC to file her Charge and cross-file it with the Iowa Civil Rights Commission ("ICRC"). Pursuant to a work-sharing agreement, the EEOC formally received the Charge on behalf of both agencies and deemed the Charge to be "initially instituted" with the ICRC. (In the work-sharing agreement, the EEOC and ICRC reciprocally designated each other as agents for receiving charges of unlawful employment

practices.) The EEOC sent a copy of the Charge to the ICRC, notified the ICRC that the Charge "is to be initially investigated by the EEOC," *id.* at 3000, and began its investigation.[1]

Because the EEOC deemed the Charge to be "initially instituted" with the ICRC, Ms. Starke's Charge was timely filed as to any alleged unlawful employment practice occurring on or after February 4, 2005, *i.e.*, any such practice occurring within 300 days of the filing of the Charge. In relevant part, Title VII's statute of limitations provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . , except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State . . . with authority to grant or seek relief from such practice . . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

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1. The ICRC waived its right to exclusive jurisdiction over charges initially instituted with it. For further explanation of the work-sharing agreement, see *Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 985-86 (N.D. Iowa 2003) (Bennett, C.J.). Here, the ICRC filed the Charge on December 5, 2005 but apparently stayed its own investigation pending the EEOC proceedings.

42 U.S.C. § 2000e-5(e)(1); *see, e.g., Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 360 n.8, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) ("If a charge has been initially filed with or referred to a state . . . agency, it must be filed with the EEOC within 300 days after the practice occurred . . . ."). An influential treatise explains

> there is a dual aspect to the Title VII limitations periods; they have a retrospective, as well as a prospective, aspect. In other words, not only must charges be filed within 180 (or 300) days after a discriminatory event, but also, as a general rule, the aggrieved party can only achieve redress for discriminatory acts which occurred 180 (or 300) days prior to the filing of charges.

4 Lex K. Larson, *Employment Discrimination* § 72.02, at 72-5 (2d ed. July 2008).

3. The EEOC's investigation

Upon receipt of the Charge, the EEOC immediately notified CRST of Ms. Starke's allegations. The EEOC ordered CRST to file a response to the Charge on or before December 30, 2005. The record does not disclose CRST's response to Ms. Starke's allegations.

The nature, scope and duration of the EEOC's investigation is unknown to the court. Further, it is unclear to what extent the EEOC attempted to conciliate

Ms. Starke's allegations with CRST.[2] What *is* certain is that Ms. Starke never exercised her right to file a Title VII lawsuit against CRST while her Charge was pending before the EEOC. Title VII grants the charging party who is unwilling to await the conclusion of extended EEOC proceedings a right to file suit 180 days after the charge was filed. 42 U.S.C. § 2000e-5(f)(1); *Occidental Life*, 432 U.S. at 361.

B. The EEOC's Complaint

On September 27, 2007, nearly two years after Ms. Starke filed her Charge, the EEOC filed the instant lawsuit on behalf of Ms. Starke "and a class of similarly situated female employees of [CRST] . . . ." Complaint (docket no. 2), at 1. Pursuant to 42 U.S.C. § 2000e-5(f)(1) and (3) and 42 U.S.C. § 1981a, the EEOC purports to bring suit in its own name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Ms.] Starke and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint ("EEOC's Complaint") (docket no. 8), at 1.[3] The EEOC

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2. Title VII requires the EEOC to engage in "informal methods of conference, conciliation, and persuasion" before filing suit. 42 U.S.C. § 2000e-5(b). CRST does not complain that the EEOC failed to conciliate the allegations of Ms. Starke or anyone else. *Cf. EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 940 (N.D. Ill. 2001) (making clear the EEOC and the defendant conciliated claims of all "class" members).

3. The EEOC's Complaint, filed on November 16, 2007, corrected a typographical error in the Complaint. Ruling (docket no. 31), at 1 n.1.

generally alleges that Ms. Starke and the other similarly situated women "were adversely affected . . . when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them . . . ." *Id.*

The heart of the EEOC's Complaint contains the following specific allegations against CRST:

> 7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e-2 and 2000e-3. Among other things, two of its lead drivers subjected [Ms.] Starke to sexual harassment during their supervision of [her] (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect [Ms.] Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.
>
> 8. Other similarly situated female employees of CRST were also subjected to sexual harassment

> and a sexually hostile and offensive work environment while working for CRST, including, among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.
>
> 9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive [Ms.] Starke and class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

EEOC's Complaint at 2-3. The EEOC alleges that CRST's actions "were intentional" and "done with malice or with reckless indifference to the federally protected rights of [Ms.] Starke and the class of similarly situated female employees." *Id.* at 3.

The EEOC asks the court for "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment [and] any other employment practice which discriminates on the

basis of sex." *Id.* at 4. The EEOC further asks the court to "[o]rder CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices." *Id.* Finally, the EEOC asks the court to order CRST to pay Ms. Starke and the similarly situated female employees compensatory damages, punitive damages and ordinary costs. The requested compensatory damages include back pay, pre-judgment interest, front pay and recompense for "emotional pain, suffering, and humiliation." *Id.*

Notably, the EEOC did *not* that allege CRST was engaged in "a pattern or practice" of illegal sex-based discrimination or otherwise plead a violation of 42 U.S.C. § 2000e-6. Further, the EEOC's Complaint does not state with particularity how Ms. Starke or the other similarly situated women exhausted their administrative remedies. The EEOC simply represents that, "[m]ore than 30 days prior to the institution of [the] lawsuit, [Ms. Starke], then a CRST employee, filed a charge with the EEOC alleging violations of Title VII by CRST." *Id.* Similarly, it is unclear why the EEOC used Ms. Starke's Charge to file this lawsuit on behalf of an untold number of similarly situated women--all of whom remain unnamed in the EEOC's Complaint. In other words, it is unknown what led the EEOC to use the Charge as "a jurisdictional springboard." *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976) (cited with approval in *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) ("Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.")).

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On November 30, 2007, CRST filed an Answer and Affirmative Defenses (docket no. 11). On May 1, 2008, CRST filed an Amended Answer and Affirmative Defenses ("Answer") (docket no. 36) to assert an additional affirmative defense. CRST denies the substance of the EEOC's Complaint and asserts seven affirmative defenses, including but not limited to waiver or release, failure to exhaust administrative remedies and "untimel[iness]." Answer at 2.

C. Scheduling

On February 8, 2008, the court adopted the parties' Scheduling Order and Discovery Plan ("Scheduling Order") (docket no. 21). Among other things, the parties agreed to a December 7, 2008 deadline for completion of discovery and a trial ready date of May 15, 2009. The parties estimated trial would last twenty days. In reliance upon the parties' representations, the court scheduled the trial to commence at some time "during the two-week period beginning on June 15, 2009" with the exact dates and times of the trial to be determined closer in time to the trial date. Trial Management Order (docket no. 22), at 1 (emphasis omitted).

D. Other Allegedly Aggrieved Persons

1. Unnecessary confusion

The vague reference in the EEOC's Complaint to "[Ms.] Starke and a class of similarly situated female employees" has added unnecessary confusion to this case in at least two respects:

First, the EEOC's use of the phrase "[Ms.] Starke and a class of similarly situated female employees" does not comport with the language or structure of the statute upon which it sued, 42 U.S.C. § 2000e-5. The phrase naturally evokes the thought of Ms. Starke as the named plaintiff in a Rule 23 class action against CRST. To the contrary, it is settled that "the EEOC may maintain its [§ 2000e-5(f)(1)] civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule of Civil Procedure 23." *Gen. Tel.*, 446 U.S. at 333-34 (footnote omitted). For example, the EEOC may pursue relief on behalf of a group of allegedly aggrieved persons "even though competing interests are involved," *id.* at 331, or even if there is "a huge variance in the nature and extent of the injuries suffered" within such group, *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002) (Posner, J.). Any limitation upon the EEOC to sue only on behalf of "similarly situated female employees" in this case was self-imposed.

To remedy any confusion on this point, the court refers to the "similarly situated female employees" exactly as the relevant part of Title VII refers to them: as "allegedly aggrieved persons." *See* 42 U.S.C. § 2000e-5(f)(1) (referring to "[t]he person or persons aggrieved" and "the person aggrieved"). The court refrains from referring to the "similarly situated female employees" as "class members." *See, e.g., EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1124 n.2 (D. Nev. 2007) (declining to refer to allegedly aggrieved persons as "class members"); *see also Gen. Tel.*, 446 U.S. at 323 n.5 (noting

the EEOC refrained from characterizing a 42 U.S.C. § 2000e-5 lawsuit as a "class action" and instead called it an action "affecting a class of individuals"). *But see EEOC v. Int'l Profit Assocs., Inc.*, No. 01-C-4427, 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069, *1 n.1 (N.D. Ill. Oct. 23, 2007) (using term "class"); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 946 n.13 (N.D. Ill. 2001) (similar); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1076 n.10 (C.D. Ill. 1998) (similar).

Second, in the early stages of this litigation it was unclear how many "similarly situated female employees" on whose behalf the EEOC was seeking individual relief.[4] The EEOC's Complaint does not indicate whether there were two, twenty or two thousand "similarly situated female employees."[5] The EEOC had agreed, however, to the Scheduling Order, which "[e]stimated [the] length of trial" to be "20 days." Scheduling Order at 2 (emphasis in original). The court accepted this representation when planning its schedule.

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4. On September 26 and December 8, 2008, the court granted Mss. Starke, Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Latesha Thomas and Nicole Ann Cinquemano ("Plaintiffs-Interveners") permission to intervene in the instant lawsuit, pursuant to 42 U.S.C. § 2000e-5(f)(1) and Federal Rule of Civil Procedure 24. Because Plaintiffs-Interveners did not respond to the Motion, the court does not discuss their claims in the instant Order.

5. While generality might be expected in a Rule 23 class-action complaint, the EEOC has a duty to investigate and conciliate allegations *before* filing suit on them under 42 U.S.C. § 2000e-5. *See supra* note 2 (discussing § 2000e-5(b)).

As discovery progressed, it became clear to the court that the EEOC did not know how many allegedly aggrieved persons for whom it was seeking relief and was using discovery to find them. On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. CRST has produced more than 200,000 pages of documents to the EEOC in this case. *Cf. Dial*, 156 F. Supp. 2d at 938 (recounting but rejecting the defendant's argument that the EEOC had "made no effort to identify class members until several months after it filed the . . . action, when it sent a letter to approximately 400 current and former female employees").

There was a risk this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

2. Case management orders

On August 7, 2008, the EEOC filed a Motion to Modify the Scheduling Order (docket no. 37). On August 8, 2008, CRST filed a Response (docket no. 38), in which it agreed certain modifications to the Scheduling Order were appropriate but also asked the court to establish a date "by which [the] EEOC completes its identification of

class members." Response (docket no. 38), at 4. In a Reply (docket no. 42), the EEOC stated that it had identified "a total of 49 class members so far," predicted the "total class will reach between 100 and 150 individuals," indicated it believed it could identify "the bulk of the class members" by October 15, 2008, and suggested a December 7, 2008 deadline for identifying the "class members." Reply (docket no. 42), at 1-3.

On August 20, 2008, United States Magistrate Judge Jon S. Scoles issued an Order Modifying Discovery Plan (docket no. 44). Among other things, Judge Scoles set a October 15, 2008 deadline for the EEOC "to disclose the identity of class members." Order Modifying Discovery Plan (docket no. 44), at 2. Judge Scoles also continued the parties' previously agreed-upon discovery deadline to January 15, 2009. As far as the court is aware, CRST has consistently intended to exercise its right to depose all allegedly aggrieved persons on whose behalf the EEOC seeks monetary damages.

By October 15, 2008, the EEOC had identified approximately 270 aggrieved persons to CRST. This total was much greater than CRST had anticipated based upon the EEOC's representations to the court. *See, e.g.*, Response (docket no. 42), at 1-2 (estimating "the total class will reach between 100 and 150 individuals"); Scheduling Order at 2 (estimating a twenty-day trial).

On November 6, 2008, CRST filed a "Motion under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members" ("Motion to

Show Cause") (docket no. 56). CRST alleged that the EEOC did not have a good-faith basis for naming so many allegedly aggrieved persons; CRST accused the EEOC of adopting a policy of "naming everyone and asking questions later" just before the October 15, 2008 deadline. Brief in Support of Motion to Show Cause (docket no. 56-2), at 10. CRST alleged that the EEOC had simply added a large number of names found in CRST's human resources files without ever speaking to those individuals. Further, the EEOC had indicated to CRST that it reserved unto itself the option in the future "to remove some women from this list at a later date." *Id.* at 11.

In ruling upon the Motion to Show Cause, the undersigned held that the EEOC had complied with the letter, if not the spirit, of Judge Scoles's order. The court took the EEOC at its word that it had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination. Recognizing that the EEOC is "the master of its own case" (in the sense that it has the statutory authority to proceed on behalf of allegedly aggrieved persons without their consent), *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002), the court declined to "strike" all women who had not given the EEOC informed consent to proceed on their behalf in this case. The court expressed concern, however, that "CRST [still] might unfairly face a 'moving target' of prospective plaintiffs as discovery winds down and trial approaches." Order (docket no. 66), at 8.

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The court invoked its inherent case management authority, Fed. R. Civ. P. 26(f), Fed. R. Civ. P. 16(b) and LR 16, and adopted the following three rules going forward to forestall any prejudice to CRST. The court ordered the EEOC to (1) immediately file with the court a corrected list of the approximately 270 allegedly aggrieved persons it had disclosed to CRST on October 15, 2008 (the list the EEOC previously disclosed contained many errors); (2) immediately inform CRST and file an amended disclosure list with the court as soon as it learned that it no longer wished to pursue individual claims on behalf of any of the women on the list; and (3) make all allegedly aggrieved persons on whose behalf the EEOC sought relief available to CRST for a deposition before the conclusion of discovery on January 15, 2009. The court then ordered: "If the EEOC fails to make a woman available, as a discovery sanction the court will not permit her to testify at trial and will bar the EEOC from seeking relief on her behalf in this case." *Id.* at 9.

Subsequently, the EEOC made approximately 150 of the 270 allegedly aggrieved women available for deposition. It appears CRST deposed all of the women whom the EEOC made available. At present, therefore, the EEOC intends to seek individual relief for approximately 150 allegedly aggrieved persons at trial. The EEOC desires to seek individual relief for an additional "99 women who were not deposed and therefore are subject to the discovery sanction." Response to Motion to Strike (docket no. 187), at 2. Because the EEOC did not make these women available to CRST for deposition prior to January 15, 2009, the EEOC may not seek relief for them.

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E. Motion

On February 13, 2009, CRST filed the Motion. CRST asks the court to "grant summary judgment in its favor against [the] EEOC on the pattern or practice claim." Defendant's Brief in Support of Motion ("Def.'s Br.") (docket no. 150-2), at 21. On March 16, 2009, the EEOC filed a Resistance (docket no. 168). On March 31, 2009, CRST filed a Reply (docket no. 185). On April 21, 2009, with permission of the court, CRST filed a Surreply (docket no. 194).[6]

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6. The EEOC's resistance materials contained numerous typographical errors. On April 13, 2009, the court ordered the EEOC to correct them but explicitly cautioned: "Plaintiff may only correct its prior typographical and technical errors. Plaintiff is not permitted to change any aspect of its arguments in connection with pending motions or any other substantive aspect of its filings. Order (docket no. 190), at 2 (emphasis in original). The EEOC violated the court's order. The EEOC did not merely correct its typographical and technical errors but instead elaborated upon and changed various substantive aspects of its responses to CRST's statements of individual material fact. *Compare, e.g.*, Response to Statement of Material Facts Nos. 10 & 19 (docket no. 168-2), *with* Corrected Response to Statement of Material Facts Nos. 10 & 19 (docket no. 168-4). In a more limited respect it also perpetuated its prior failure to comply with the Local Rules. *See, e.g.*, Corrected Response to Statement of Material Facts No. 19 (citing "P/P App. at 1-1386," *its entire appendix*, to refute CRST's assertions that (1) CRST's official policy prohibits sexual harassment and (2) CRST's officers and administrators all testified that CRST does not tolerate sexual harassment). However the EEOC may characterize its changes as a mere "rearrangement" of its previously submitted materials, at the very least the EEOC should have alerted the court before making such substantial revisions.

CRST requests oral argument on the Motion. The court finds oral argument is not appropriate. The Motion is fully submitted and ready for decision.

III. STATUTORY FRAMEWORK

A brief outline of the relevant statutory framework helps to place the Motion in its proper context. At first glance the Motion is odd, because it asks the court to dismiss a "pattern or practice claim" when no such claim appears in the EEOC's Complaint.

A. Sexual Harassment is Sex Discrimination

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). "The Supreme Court has determined . . . that sexual harassment 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' qualifies as [unlawful] sex discrimination under Title VII." *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 928 (8th Cir. 2008) (quoting *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)). In *Meritor*, the Supreme Court explained:

> The phrase "terms, conditions, or privileges of employment" [within 42 U.S.C. § 2000e-2(a)(1)] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.

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* * *

> [S]exual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> * * *
>
> Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.
>
> Of course . . . not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.

477 U.S. at 64-67 (citations and internal quotation marks omitted).

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To prove sex discrimination based upon a hostile work environment theory of sexual harassment, then, a plaintiff must prove "(1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of employment." *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1194-95 (8th Cir. 2006) (citing *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005)). In addition,

> if the harassment was committed by a co-worker, [a plaintiff] must . . . establish that [the employer] "knew or should have known of the conduct and failed to take proper remedial action." *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 987 (8th Cir. 1999). On the other hand, if the harassment was committed by an employee who supervised [the plaintiff], [the employer] is vicariously liable for the harassment unless it can establish the affirmative defense defined in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

Joens v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004). That is,

> [the employer] is vicariously liable for harassment by its supervisory personnel unless

> it can establish that (1) [it] exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) [the plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities provided by [the employer]. [*Ellerth*, 524 U.S. at 765]. An employer may assert the affirmative defense only "[w]hen no tangible employment action is taken." [*Faragher*, 524 U.S. at 807-08].

Gordon, 469 F.3d at 1195.

To prove sexual harassment is sufficiently unwelcome to be actionable under Title VII, a plaintiff must meet an objective standard and a subjective standard regarding the harassment itself. With respect to the objective standard, the Supreme Court has made clear over the years that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). "Title VII does not mandate an employment environment worthy of a Victorian salon." *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988). "White gloves, crystal, and fine china are neither required nor expected." *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 662 (D. Minn. 1991) ("*Jenson I*").[7] Title VII was not

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7. The court discusses *Jenson v. Eveleth* in greater detail in Part III.C.2 *infra*. *Jenson* is perhaps one of the most famous employment discrimination cases in the Eighth Circuit. Hollywood made the case famous in the 2005 film *North Country*, which

designed to "displace all ribaldry on the roadway," and "[o]ne may well expect that . . . language of the barracks will always predominate over that of the ballroom." *Hall*, 842 F.2d at 1017-18. With respect to the subjective standard, it is settled that, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris*, 510 U.S. at 21-22.

B. Differences Between "§ 706" & "§ 707" Lawsuits by the EEOC

Two distinct parts of Title VII separately authorize the EEOC to bring suit in its own name to ferret out unlawful sex discrimination: § 706 of Title VII, 42 U.S.C. § 2000e-5 ("§ 706"), and § 707 of Title VII, 42 U.S.C. § 2000e-6 ("§ 707").

1. Lawsuits under § 706

Section 706 permits the EEOC to sue a private employer on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). The EEOC may file a § 706 lawsuit against a private employer, after the filing of a charge of unlawful employment discrimination with the EEOC, if the EEOC finds "reasonable cause" the employer has violated Title VII. *Id.; see, e.g., Occidental Life*, 432 U.S.

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starred actors Charlize Theron, Frances McDormand, Woody Harrelson and Sissy Spacek.

at 359-60 (summarizing process for the EEOC to file a § 706 lawsuit). In *General Telephone*, the seminal § 706 case, the Supreme Court succinctly explained:

> Title VII . . . authorizes the procedure that the EEOC followed in this case. Upon finding reasonable cause to believe that [a private employer] had discriminated against female employees [upon the filing of four individual charges of discrimination with the EEOC], the EEOC filed suit . . . . [T]he EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.

446 U.S. at 324.

The EEOC is "master of its own case" when bringing suits on behalf of aggrieved persons in a § 706 lawsuit. *Waffle House*, 534 U.S. at 291. For example, it may bring suit with or without the consent of the aggrieved persons. *Id.* at 291-92. Nonetheless, it is axiomatic that the EEOC stands in the shoes of those aggrieved persons in the sense that it must prove all of the elements of their sexual harassment claims to obtain individual relief for them. Likewise, the full range of legal remedies available to individuals is generally available to the EEOC if the EEOC prevails on their behalf. The EEOC is entitled to equitable relief, 42 U.S.C. § 2000e-5(g), and may also usually pursue compensatory and punitive damages, 42 U.S.C. § 1981a(a)(1).

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2. Lawsuits under § 707

Section 707 permits the EEOC to bring suit against employers whom it has reasonable cause to believe are engaged in "a pattern or practice" of unlawful employment discrimination. 42 U.S.C. § 2000e-6; *see also Gen. Tel. Co.*, 446 U.S. at 327 n. 9 ("If, for any reason, [the] EEOC .... believes a pattern or practice of discrimination exists in [a private employer], its recourse is to file a suit under § 707." (citations and emphasis omitted)). Like § 706, § 707 grants the EEOC the right to seek equitable relief against employers found to have intentionally engaged in a pattern or practice of unlawful employment discrimination. 42 U.S.C. § 2000e-6(a). Unlike § 706, however, the EEOC is not authorized to seek compensatory or punitive damages under § 707; the relevant portion of 42 U.S.C. § 1981a only authorizes recovery of compensatory and punitive damages "[i]n an action brought by a complaining party under [§ 706]." 42 U.S.C. § 1981a(a)(1).

"A pattern or practice case seeks to eradicate systemic, company-wide discrimination and focuses on an objectively verifiable policy or practice of discrimination by a private employer against its employees." *Mitsubishi*, 990 F. Supp. at 1070. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) is the seminal § 707 case. In *Teamsters*, the United States[8] alleged a company, with the assistance of a union, engaged

8. Section 707 originally authorized the Attorney General of the United States to bring "pattern or practice" lawsuits. The authority now rests with the EEOC. *Teamsters*, 431 U.S. at 329 n.1 (discussing 1972 amendments to Title VII).

in a pattern or practice of discriminating against certain persons in failing to recruit, hire, transfer and promote them to higher paying, more desirable jobs, including "line driver" jobs, on an equal basis with white persons. 431 U.S. at 335. The United States brought the lawsuit under § 707 and alleged the company had engaged in a "pattern or practice" of unlawful employment discrimination. *Id.* at 328-29. The United States sought injunctive and other equitable relief, including "make whole" relief that would allow discriminatees to transfer to line driver positions without losing seniority. *Id.* at 330.

The United States presented damning statistical evidence to prove its pattern or practice claim:

> As of March 31, 1971, shortly after the Government filed its complaint alleging systemwide discrimination, the company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. Of the 1,828 line drivers, however, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed persons, and all of the Negroes had been hired after the litigation had commenced. With one exception--a man who worked as a line driver at the Chicago terminal from 1950 to 1959--the company and its predecessors *did not employ a Negro on a regular basis as a line driver until 1969.* And, as the Government showed, even in 1971 there were terminals in areas of substantial Negro population where all of the company's

> line drivers were white. A great majority of the Negroes (83%) and Spanish-surnamed Americans (78%) who did work for the company held the lower paying city operations and serviceman jobs, whereas only 39% of the nonminority employees held jobs in those categories.

431 U.S. at 337-38 (footnotes omitted, emphasis in original). The United States also "bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination." *Id.* at 338.

After a trial, the district court found by a preponderance of the evidence that the company had engaged in a pattern or practice of unlawful employment discrimination. *Id.* at 330-31. The district court granted most of the United States's requested equitable relief. *Id.* at 331-32. On appeal, the Supreme Court held that there was sufficient evidence in the record to support the district court's determination that the employer had engaged in a pattern or practice of unlawful employment discrimination. *Id.* at 337.

In affirming the judgment of the district court on this issue, the Supreme Court set forth the governing legal standard for pattern or practice claims. The standard survives to this date. To prove a pattern or practice claim, the EEOC must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure--the regular rather than the unusual practice." *Id.* at 336. That is, the EEOC is

required "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* In a footnote, the Supreme Court observed that "the 'pattern or practice" language in [§ 707] was not intended as a term of art, and the words reflect only their usual meaning." *Id.* at 336 n.16 (citation omitted). A pattern or practice is

> "present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute. The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . ."

Id. (quoting Statement of Senator Humphrey, 110 Cong. Rec. 14270 (1964)); *see also Catlett v. Mo. Hwy. & Transp. Comm'n*, 828 F.2d 1260, 1265 (8th Cir. 1987) ("A pattern or practice is present when the discriminatory acts were not isolated, insignificant, or sporadic, but were repeated, routine or of a generalized nature[.]"); *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 486 (8th Cir. 1984) (Swygert, J., sitting by designation, dissenting in part) ("What must be proved . . . is that the employer engaged in a consistent rather than a sporadic pattern of discrimination.").

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The Supreme Court also adopted a burden-shifting framework for pattern or practice suits in which disparate treatment on the basis of race is alleged. The Court explained:

> The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. At the initial, "liability" stage of a pattern-or-practice suit[,] the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that . . . during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.
>
> If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from

the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order "necessary to ensure the full enjoyment of the rights" protected by Title VII.

When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. [A]s is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking.

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made

> in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. [T]he burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Teamsters, 431 U.S. at 360-62 (footnotes and citations omitted); *see also Craik*, 731 F.2d at 470 (clarifying that in pattern-or-practice cases, at the remedial stage the burden of persuasion--not just the burden of production--shifts to the employer).

3. Summary of differences

To summarize, "[t]here is a significant distinction between §§ 706 and 707 claims." *Scolari*, 488 F. Supp. 2d at 1143. As the Supreme Court has recognized:

> A Commissioner may file a charge in either of two situations. First, when a victim of discrimination is reluctant to file a charge . . . because of fear of retaliation, a Commissioner may file a charge on behalf of the victim. [42 U.S.C. § 2000e-5.] Second, when a Commissioner has reason to think that an employer has engaged in a "pattern or practice" of discriminatory conduct, he may file a charge on his own initiative. [42 U.S.C.] § 2000e-6.

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EEOC v. Shell Oil Co., 466 U.S. 54, 62, 104 S. Ct. 1621, 80 L. Ed. 2d 41 (1984); *see also Mitsubishi*, 990 F. Supp. at 1084 n.18 ("The Supreme Court's statements [in *Shell Oil*] recognize the difference between a § 706 and a § 707 case, by indicating that a Commissioner's charge under § 706 is filed on behalf of an individual, whereas a Commissioner's charge under § 707 is filed on "his own initiative" for the purpose of alleging a pattern or practice of discrimination rather than individual discrimination.").

Similarly, the Tenth Circuit Court of Appeals observed:

> The EEOC is .. authorized to file two types of civil actions to redress employment discrimination. Under [§] 707, it may bring a civil action when it determines that there is "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured (by provisions of the Act relating to employment discrimination), and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described . . .." 42 U.S.C. [§] 2000e-6(a).
>
> Section 706, on the other hand, is addressed to vindication of individual instances of employment discrimination. [The] EEOC['s] involvement is initiated by the filing of a specific charge of employment discrimination. The EEOC must investigate and make a

> finding as to reasonable cause. If reasonable cause is found to support the charge, the next step is conciliation. Only when conciliation is attempted and the efforts fail may the EEOC enter into litigation under [§] 706.

EEOC v. Cont'l Oil Co., 548 F.2d 884, 887 (10th Cir. 1977).

Finally, one district court elaborated:

> [A] § 706 case is based on one or more individual charges or complaints of unlawful discrimination by an employer, and a § 707 case is based on a pattern or practice of systemic discrimination by an employer. Although both a § 706 case and a § 707 case can be filed by the EEOC in its own name and initiated by a "Commissioner's charge," rather than an individual charge, the converse is not true. A § 707 case cannot be initiated by an individual charge, and it cannot be filed as a civil suit by an individual. A § 707 case is a "pattern or practice" case that challenges systemic, wide-spread discrimination by an employer. Conversely, a § 706 case seeks to vindicate, sometimes on a class-wide basis, the rights of aggrieved individuals who are challenging an unlawful employment practice by an employer. The distinction is subtle and not immediately apparent from the language of Title VII, but it is, nonetheless, an important distinction.

Mitsubishi, 990 F. Supp. at 1084 (citation and footnote omitted).

4. Confusion in this case

"Notwithstanding [the] differences [between the two statutes], courts have blurred the line between class-wide claims brought pursuant to § 706 and pattern-or-practice claims brought pursuant to § 707." *Scolari*, 488 F. Supp. 2d at 1143 (citations omitted); *see, e.g., Dial*, 156 F. Supp. 2d at 969 (concluding that "a pattern-or-practice action can be brought, both as a general matter and in this case, for sexual harassment claims under §§ 706 and 707 of Title VII"). Not surprisingly, it appears much confusion has already crept into this case. The EEOC is pursuing matters in this case that it did not plead or allege in the EEOC's Complaint.

The EEOC's Complaint reads as if the EEOC were asserting a prototypical § 706 action. The EEOC squarely pled a violation of § 706. The EEOC did not plead a violation of § 707, and the phrase "pattern or practice"-- a phrase with which the EEOC is familiar--appears nowhere in the EEOC's Complaint. Consistent with its decision to only plead a violation of § 706, the EEOC seeks compensatory and punitive damages from CRST pursuant to 42 U.S.C. § 1981a.

In recent months, however, the EEOC has made clear to the court and CRST that it believes CRST had engaged in "a pattern or practice" of tolerating sexual harassment. *See, e.g.*, Brief in Resistance to Statute of

Limitations ("Lim. Br.") (docket no. 165-1), at 4 ("This is a case brought by the [EEOC], alleging a pattern or practice of tolerating a hostile work environment based on sexual harassment."). The EEOC belatedly sought bifurcation of trial in accordance with *Teamsters*. It also announced its intention to invoke the *Teamsters* burden-shifting framework.

In sum, it would appear the EEOC is attempting to have its cake and eat it too. That is, the EEOC is attempting to avail itself of the *Teamsters* burden-shifting framework yet still seek compensatory and punitive damages under § 706. *Cf. Dial*, 156 F. Supp. 2d at 930 (seeking compensatory and punitive damages in a § 707 lawsuit). Complicating matters further, it is important to remember that the Supreme Court designed the *Teamsters* burden-shifting framework with only equitable relief in mind. *See Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1290 n.4 (8th Cir. 1997) (discussing 1991 amendments to Title VII, which allowed plaintiffs to seek compensatory and punitive damages under § 706); *see also Bemis*, 279 F.3d at 421 (pointing out that merely injunctive relief and back pay and not "common-law-type damages" were available when the Supreme Court decided *General Telephone*).

Fortunately, the court need not cut through this cloud of confusion to rule on the Motion. CRST does not argue that the EEOC's Complaint fails to state a "pattern or practice claim." Indeed, CRST filed the instant Motion to seek its dismissal; presumably, CRST does not seek to dismiss what it does not believe to exist. Accordingly, the court assumes without deciding that at least one of two

legal principles is true: either (1) § 706 somehow permits the EEOC to pursue a pattern or practice claim and thereby render § 707 a mere redundancy in the law[9] or (2) the EEOC has constructively amended its complaint to assert a § 707 claim against CRST in this lawsuit in addition to its § 706 claim. In other words, the court assumes without deciding that this is a sexual harassment pattern or practice case.

C. Sexual Harassment Pattern or Practice Cases are Special

1. The Teamsters model "breaks down"

Sexual harassment pattern or practice cases are special. As several district courts have recognized over the last two decades, the *Teamsters* pattern or practice model "breaks down" when the unlawful employment practice at issue is sexual harassment based on a hostile work

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9. In response to a pending motion, the EEOC maintains that any distinction between §§ 706 and 707 "is not useful" because, in its view, both statutes authorize pattern or practice cases and require "identical" elements of proof. Lim. Br. at 10. Without citing any controlling legal authority, the EEOC concludes that "there is no difference between pleading either statute." *Id.* at 11; *see, e.g., EEOC v. Gen. Tel. Co. of Nw., Inc.*, 599 F.2d 322, 328-33 & nn.13-14 (9th Cir.) (appearing to reach conclusion that § 707 is a redundancy in the law), *aff'd on other grounds*, 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1979); *Craik*, 731 F.2d at 468-70 (sanctioning use of *Teamsters* model in § 706 class action brought by private plaintiffs) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976)); *see also Jenson*, 130 F.3d at 1299-1300 (discussed in Part III.C.2 *infra*).

environment. *Mitsubishi*, 990 F. Supp. at 1071; *see also Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069, at *3 (similar); *Jenson v. Eveleth Taconite Corp.*, 824 F. Supp. 847, 875-76 (D. Minn. 1993) ("*Jenson II*") (similar). One of the district courts to address the issue most recently observed:

> [I]n a race discrimination case[,] it is clear why a pattern or practice finding should have an effect on an employer's liability to individual claimants. If an employer has an established policy of making employment decisions with racial animus in violation of Title VII, it is likely that any specific employment decision also violates Title VII, and if a particular decision was not discriminatory, the employer is in the best position to show why. However, the impact of a pattern or practice finding in a hostile work environment sexual harassment case is not so clear. In contrast with a race discrimination case--where the focus is on the employer's basis for making an employment decision that adversely affected the claimant--a sexual harassment case centers on the gravity of the conduct to which a claimant was exposed. The sexual harassment suffered by the claimant must have been severe or pervasive enough (measured both objectively and subjectively) to constructively alter the terms or conditions of the claimant's employment by creating a hostile work environment. Otherwise, no Title VII violation has occurred. Therefore, a finding

> that an employer had a pattern or practice of tolerating sexual harassment in violation of Title VII does not necessarily establish that an individual claimant was exposed to harassment or that the harassment an individual claimant suffered violates Title VII. It is thus unclear what effect a pattern or practice finding should have on an individual claimant's suit for damages.

Int'l Profit Assocs., 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069 at *3 (citations omitted).

2. *The modified burden-shifting approach of* Jenson II

Jenson II was the first reported case to address the tension between the *Teamsters* burden-shifting framework and the Supreme Court's sexual harassment jurisprudence. Notwithstanding its status as a private class action lawsuit, *Jenson II* is similar to the case at bar insofar as the district court assumed the *Teamsters* burden-shifting framework applied to § 706. *Jenson II*, 824 F. Supp. at 860 (citing *Craik*, 731 F.2d at 470). As indicated in Part III.C.1 *supra*, the court assumes without deciding that the EEOC is properly pursuing a pattern or practice claim under § 706 on behalf of similarly situated aggrieved persons in this action, even though Congress apparently contemplated that the EEOC would bring its pattern or practice lawsuits under § 707 and *Teamsters* was a § 707 case in which only equitable relief was available.

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After a bench trial, the district court found that the defendant-employer had engaged in a pattern or practice of sex discrimination. *Id.* at 874-88. Specifically, the court found that it was the company's standard operating procedure to tolerate a hostile work environment based on sex. *Id.* Among other things, the district court found that (1) men occupied virtually every supervisory and managerial position and created a "sexualized environment" for their female subordinates, *id.* at 885; (2) women worked in a largely unified work environment in which "[v]irtually all of the relevant testimony and evidence indicates that male employees, [including first-line supervisors,] felt free to and did exhibit sexually-focused material anywhere they chose," *id.* at 880; (3) "verbal statements and language reflect[ed] a sexualized, male-oriented, and anti-female atmosphere," *id.*; (4) plaintiffs presented expert testimony to show rampant "sex stereotyping" at work, *id.* at 880-81 & n.81; (5) the defendant-employer's management was aware and should have been aware of the hostile work environment, *id.* at 886-88; (6) the defendant-employer failed to establish a system for processing sexual harassment complaints, *id.* at 887; (7) the defendant-employer did not discipline harassers even though they were readily identifiable, *id.*; (8) no member of management was assigned the responsibility to curtail sexual harassment in the workplace, *id.*; and (9) the defendant-employer made "no effort" to communicate with its employees that sexual harassment was wrong, *id.* at 888.

In reaching these findings, the district court considered itself ordinarily bound to apply the *Teamsters*

burden-shifting framework in § 706 private class action lawsuits. *Id.* at 860 (citing *Craik*, 731 F.2d at 470). However, the district court identified the tension between the *Teamsters* burden-shifting framework and the Supreme Court's sexual harassment jurisprudence and devised the following solution:

> Should the employer be found to have engaged in a pattern or practice of discriminating against women by maintaining a hostile environment, the plaintiff class will be eligible for appropriate prospective relief and other remedies consistent with a finding of liability in other pattern or practice cases. However, the nature of a hostile environment claim mandates that the nature of the recovery phase differ from traditional pattern and practice cases. Specifically, a determination that the employer engaged in a pattern or practice of discrimination by maintaining a hostile environment does not entitle every member of the plaintiff class to a presumption that they were sexually harassed--the burden of persuasion does not shift to the employer. Instead, the burden of persuasion remains on the individual class members; each must show by a preponderance of the evidence that she was as affected as the reasonable woman. If this showing is made, the individual member is entitled to all the remedies available under Title VII . . . . In a hostile environment class action, therefore, every member of the plaintiff class remains a "potential victim" in the true sense of the term.

This result is dictated by the fact that the proof introduced during the liability phase cannot resolve a disparate issue of fact essential to claims alleging hostile environment: whether individual members of the plaintiff class were as affected as the reasonable woman would have been. Because the employee's subjective response to acts of sexual harassment is an essential part of proving a claim of hostile environment sexual harassment, a presumption that the employer discriminated against individual class members may not arise from a determination that the reasonable woman would have been affected by the acts of sexual harassment. Individual employees should not be allowed to circumvent an essential element of a hostile environment claim merely because they are permitted to pursue their claims as a class . . . .

Nevertheless[,] . . . liability to the class is established by a determination that the employer engaged in a pattern or practice of exposing women to acts of sexual harassment sufficient to alter the terms or conditions of the reasonable woman's employment. Accordingly, individual class members need only show that they were at least as affected as the reasonable woman. The other elements of a hostile environment claim are established by the court's determination in the liability phase of the proceedings.

Id. at 875-76 (citations and footnotes omitted). To rule to the contrary would "effectively shift[] to [the] defendant the burden of proof on an issue which is carried by the plaintiff in an individual action." *Id.* at 876 n.73. On appeal in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997), the Eighth Circuit Court of Appeals adopted the district court's modification of the *Teamsters* burden-shifting framework in pattern or practice sexual harassment cases.

Some courts and commentators have overlooked the importance of the Eighth Circuit Court of Appeals's decision in *Jenson*. *Compare EEOC v. Carrols Corp.*, No. 5:98-CV-1772, 2005 U.S. Dist. LEXIS 8337, 2005 WL 928634, at *2 n.4 ("[N]o Court of Appeals has yet addressed the question."), *Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069, at *6 ("[N]o appellate courts have addressed this issue[.]") *and* Timothy G. Healy, Note, *Sexual Pattern: Why a Pattern or Practice Theory of Liability is Not an Appropriate Framework for Claims of Sexual Harassment*, 10 Roger Williams U. L. Rev. 537, 538 (2005) ("Healy Article") ("[T]he issue of whether sexual harassment cases can proceed under a pattern or practice framework . . . has received virtually no attention in the federal courts of appeals."), *with Mitsubishi*, 990 F. Supp. at 1078 n.13 (recognizing that the Eighth Circuit Court of Appeals "placed its imprimatur on the district court's conclusion that the burden shifting framework of . . . [*Teamsters*] applies in a pattern or practice class case to shift a burden of proof to the employer, once an individual has established the subjective elements of her case" (emphasis omitted). The significance of the Eighth

Circuit Court of Appeals's opinion is perhaps obscured by the fact that much of the opinion is focused on unrelated issues and the Eighth Circuit Court of Appeals does not elaborate on its reasons for adopting the framework. This part of the opinion, however, is definitely not dicta. The Eighth Circuit Court of Appeals reversed and remanded on the issue of damages because a special master had failed to apply the district court's modified *Teamsters* burden-shifting framework. After discussing *Teamsters*, the Eighth Circuit Court of Appeals stated:

> In the damages phase, the plaintiffs still were required to show they were as affected by that hostile environment as a reasonable woman would be affected. [*Jenson II*], 824 F. Supp. at 876)). However, once they made that showing, the burden of proof shifted to [the defendant-employer] to show that it was more likely than not that their decision to not return to work was not the product of the hostile work environment. On this basis, these claims for economic loss are remanded to the district court to be calculated under the proper burden-shifting principles.

Jenson, 130 F.3d at 1300. The Eighth Circuit Court of Appeals specifically expressed its holding as follows:

> We find the Special Master did not apply the appropriate burden-shifting principles in its analysis . . . . Specifically, the Special Master failed to place the burden of proof on [the defendant-employer] to show that the plaintiffs'

> resignations were *not* caused by the hostile working environment once the Special Master determined the individual plaintiff[s] had established the requisite subjective element of their hostile environment claim.

Id. at 1299 (emphasis in original).

3. Summary

Accordingly, if the court finds that it was CRST's "standard operating procedure" to tolerate sexual harassment in its workplaces, the court must apply the *Teamsters* burden-shifting framework as modified by *Jenson II*. *Jenson II*'s modified burden-shifting framework is the law of the Eighth Circuit in hostile work environment sexual harassment pattern or practice cases. The court is obliged to decline to follow other district courts that have expressly rejected *Jenson II*, *see, e.g.*, *Mitsubishi*, 990 F. Supp. at 1069-82, or reached seemingly contrary results, *see, e.g.*, *Dial*, 156 F. Supp. 2d at 947-49.[10]

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10. *Mitsubishi* extended the *Teamsters* burden-shifting framework to sexual harassment cases without much reservation. The court conceded its decision effectively eliminated the subjective element of the individual plaintiff's prima facie case, required modification of *Meritor* and *Harris* and obliterated some of the employer's individual defenses. The district court reasoned that the subjective element was "virtually a formality" and shifting the burden of proof to a defendant "does not appear to be anything new in sexual harassment law, since that burden has essentially always been borne by the employer." 990 F. Supp. at 1078. The district court also made the following circular argument:

> The Court's rationale for eliminating the subjective proofs necessary in an individual action at the pattern or practice stage is quite simple. Sexual harassment claims involve individual questions and defenses which cannot be tried, as to the class, on common issues of liability. This is the problem and the solution.

Id. at 1076 (footnote omitted). *Dial* by and large followed *Mitsubishi* without revisiting the underlying arguments at issue.

Mitsubishi and *Dial* are controversial among district courts within the Seventh Circuit. *See, e.g., Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069, at *12 (declining to follow *Mitsubishi, Dial* and *Jenson II*). Although *Mitsubishi* and *Dial* were two of the first sexual harassment pattern or practice cases in the country, "[i]t is worth noting that neither [case] ever reached trial[.]" 2007 U.S. Dist. LEXIS 78378, [WL] at *8. The Seventh Circuit Court of Appeals has not placed its imprimatur on either case.

"The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation . . . ." *Bemis*, 279 F.3d at 421. As in *International Profit Associates*, however, throughout this case the EEOC has sought "to blend aspects of *Mitsubishi, Dial*, and *Jenson* to create an approach that will dramatically increase its odds of prevailing . . , particularly with its ability to recover punitive and compensatory damages." 2007 U.S. Dist. LEXIS 78378, [WL] at *9; *see, e.g., EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2009 U.S. Dist. LEXIS 36324, 2009 WL 972855, *3 (N.D. Iowa Feb. 25, 2009) (forestalling the EEOC's attempt to recover punitive damages on a "class-wide basis"). Armed with *Mitsubishi* and *Dial*, it is not surprising few cases have gone to trial or reached the circuit courts of appeals. *See* Healy Article at 537 (observing that pattern or practice cases are cumbersome and expensive to

The court must also decline one recent commentator's invitation to abandon the *Teamsters* burden-shifting framework altogether. *See* Healy Article at 538 ("When considering the inherently individualized nature of sexual harassment claims and all of the procedural problems as a whole, it is evident that a pattern or practice theory of liability is not an appropriate framework for bringing sexual harassment claims.").

III. THE MERITS

Assuming without deciding that this is a pattern or practice sexual harassment case and bound to the modified burden-shifting framework of *Jenson II*, the fighting issue in the Motion is whether the EEOC has presented the court with sufficient evidence to warrant a jury trial on its pattern or practice claim.

A. Standard for Summary Judgment

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505,

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litigate) & 578 (discussing *Mitsubishi* and *Dial* and observing that the unwarranted extension of the *Teamsters* burden-shifting framework to sexual harassment pattern or practice cases "has resulted in substantial settlements").

91 L. Ed. 2d 202 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am.*, 450 F.3d 816, 820 (8th Cir. 2006) (citing *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006)).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see, e.g., Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1022 (8th Cir. 2006) ("Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial."). The nonmoving party must offer proof "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "'Evidence, not contentions, avoids summary judgment.'" *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

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B. Preliminary Evidentiary Rulings

For purposes of the Motion, the material facts are largely undisputed. First, each party expressly admits many of the other party's Local Rule 56 individual statements of material fact. Second, some of the EEOC's Local Rule 56.b.2 qualifications and denials of CRST's Local Rule 56.a.3 individual statements of material fact contain incorrect citations to the EEOC's appendix or otherwise lack support in the record. The court deems those respective statements to be admitted. *See* LR 56.b ("The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact."); *see, e.g., Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1032-33 (8th Cir. 2007) (affirming district court's decision to deem statements of material fact to be admitted). Third, some of the EEOC's Local Rule 56.b.3 statements of additional material fact are similarly deficient, and so the court declines to assume their truth. Finally, the court declines to consider any evidence that lacks foundation or would otherwise be inadmissible at trial. *See, e.g., Firemen's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1310 (8th Cir. 1993) ("The district court must base its determination regarding the presence or absence of a material issue of factual dispute on evidence that will be admissible at trial."). For example, in its resistance materials the EEOC relies heavily upon complaints or reports of sex discrimination involving 99 women it failed to make available to CRST for deposition during discovery. Such complaints and related evidence is inadmissible for all of the reasons stated in Judge Scoles' Ruling (docket no. 193) granting in part

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CRST's Motion to Strike (docket no. 171).

C. Summary Judgment Facts

Viewed in the light most favorable to the EEOC and affording the EEOC all reasonable inferences, *Baer Gallery*, 450 F.3d at 820, the summary judgment facts are these:

1. CRST's business model

CRST is a family-owned trucking business. It was founded in Cedar Rapids, Iowa, in 1955. It operates nationwide.

CRST owns the trucking industry's largest fleet of team-driven tractors. CRST offers "just in time" and other premium transportation services. CRST focuses on long-haul transport but also provides short-haul and regional deliveries, air cargo shipping and dedicated fleets.

CRST fills a "market niche" and makes deliveries faster than its competitors. Two drivers working together are able to make deliveries faster than one driver acting alone. A single CRST truck is able to operate as many as twenty-two hours a day, with each driver "at the wheel" for up to eleven hours.

Working conditions for CRST's drivers are different from those of most other jobs. Drivers spend up to twenty-two hours a day in a tractor with a single coworker. Each

two-person team must remain in a small truck cab while the tractor is moving. The cab is a combination driving and living compartment and consists of two front seats and a berth area with two bunk beds. Trips last up to twenty-one days, and drivers usually spend no time with their families during these trips. Access to restrooms and showers is limited. Drivers must find truck stops or rest areas, which takes time and thereby impacts the delivery time of the load and the drivers' pay. Drivers work in distant locations, and supervisors rarely see drivers working together. Fatality rates show truck driving is the ninth most dangerous occupation in the United States of America. All told, CRST's drivers share more in common with astronauts, submariners or lighthouse watchmen than they do with the average office worker.

2. Front-line personnel

CRST focuses on hiring entry-level drivers, because it can be difficult to find experienced drivers in the labor market. CRST employs three categories of drivers: "trainees" a/k/a "students," "co-drivers," and "lead drivers" a/k/a "trainers." All three categories of drivers report to "dispatchers" a/k/a "fleet managers."

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a. Trainees

Generally, each trainee works with a lead driver for twenty-eight days. CRST pays trainees a flat rate of approximately $ 50 a day. Lead drivers show trainees how to drive CRST's tractors, monitor their progress and evaluate them at the conclusion of the training period. Lead drivers do not have the authority to hire, fire, promote, demote or reassign trainees; CRST's Safety and Operations Departments make all final decisions with respect to the trainees' employment. Successful trainees become co-drivers once CRST graduates them.

b. Co-drivers

Co-drivers earn a more lucrative "split-mileage rate." Under the split-mileage rate, each co-driver in a two-member team is paid a certain amount per mile for half of the miles the tractor travels when delivering cargo. Co-drivers are equal to each other and do not have the authority to hire, fire, promote, demote or reassign one another.

c. Lead drivers

Co-drivers become lead drivers upon the recommendation of their dispatchers and after safety reviews. Mr. George Brandmayr, CRST's Lead Driver Program Manager, does not generally interview lead driver candidates and does not actively inquire as to whether lead driver candidates have a history of sexual harassment.

d. Dispatchers

Dispatchers generally assign drivers to two-person teams based upon geographical considerations. For example, dispatchers try to place trainees with lead drivers who reside near them.

Dispatchers generally assign drivers without their input. It is CRST's policy that lead drivers are not permitted to ask to work with a member of the opposite sex.[11] However, drivers may request a reassignment, and dispatchers make reassignments when necessary.

The reassignment process may be difficult in many circumstances. Further, dispatchers often have an economic disincentive to grant reassignment requests. CRST rates its dispatchers on how well they meet production goals; reassignments may adversely affect a dispatcher's "in-service time," that is, the amount of time the trucks she manages are available to move freight. Changing lead drivers may also delay completion of a driver's training or result in lower pay for co-drivers and lead drivers.

3. Status of women at CRST

CRST employs female trainees, co-drivers, lead drivers and dispatchers. Even though CRST makes no

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11. The EEOC presented anecdotal evidence to show that drivers violated this policy. *See, e.g.*, Pl's App'x at 849 (business record noting a driver stated he "WILL TAKE FEMALES ONLY" (emphasis in original)).

special efforts to recruit women, approximately 14% of CRST's drivers are female. Given the availability of women in the relevant labor market, CRST employs more than three times as many women as an expert would predict.

CRST has a gender-neutral policy with respect to all of its driver teams: women and men often drive together. In two previous cases against trucking companies that adopted a same-sex team-driver policy, the EEOC investigated, threatened suit and sought punitive damages. Both cases were settled with consent decrees that forbade the companies from maintaining their same-sex team-driver policies.

4. CRST's policy against sexual harassment

CRST has adopted an official policy--written and unwritten--against sexual harassment and other forms of unlawful employment discrimination. A portion of CRST's Professional Driver's Handbook ("Driver Handbook") illustrates CRST's policy against sex discrimination. In pertinent part, the Driver Handbook states:

> CRST is committed to providing a work environment that is free of harassment and discrimination. In keeping with this commitment, CRST maintains a strict policy prohibiting harassment or discrimination based on . . . sex . . . . This includes any form of verbal, non-verbal, physical and visual harassment. This policy applies to all employees of CRST, including supervisors and non-supervisory employees.

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Moreover it is the policy of CRST to prevent and prohibit misconduct on the job, including sexual harassment or any other type of harassment or discrimination by co-workers, other employees, including supervisors, and persons doing business with or for [CRST]. **Any employee who reports any act of harassment and/or discrimination will NOT be subject to ANY form of retaliation. All reports of harassment and/or discrimination will be handled in a confidential manner.**

Any employee found to have acted in violation of the foregoing policies will be subject to appropriate disciplinary action, up to and including termination.

* * *

Employees who are subjected to/or witness harassment or discrimination should immediately report such conduct to any one of the following members of management:

Immediate Supervisor

Director of Human Resources - (319) 390-2770 . . . or - 1-800-366-8460

[CRST] will take the following steps in addressing complaints of harassment or discrimination in a confidential manner:

1. Fully inform the employee of his/her avenues to report and redress the harassment pursuant to [CRST's] internal complaint procedure. Advise the employee that s/he will not be disciplined or otherwise retaliated against as a result of making a complaint.

2. Immediately conduct a thorough, objective and complete investigation of the alleged harassment and make a determination about whether unlawful harassment has occurred.

3. Take prompt and effective remedial action commensurate with the severity of the offense of harassment that occurred.

4. Advise the employee of actions taken to address the complaint.

* * *

Responsibility of Employees

It is the responsibility of all employees to comply with this policy and to report all known violations of this policy to the appropriate supervisor, manager, or Human Resource representative so that corrective action may be taken.

Def.'s App'x at 145-46 (emphases in original).

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CRST requires newly hired drivers to attend a three-and-a-half day orientation. CRST employs "safety trainers" a/k/a "driver trainers" to lead the orientation and provide its drivers sexual harassment training. During the orientation, CRST's safety trainers provide drivers with a copy of the Driver Handbook and explain the company's policy against unlawful sexual harassment and other unlawful employment discrimination. Since early 2008, CRST also has shown its drivers a DVD presentation entitled "CRST Harassment Prevention and Reporting for Drivers."

At the conclusion of the orientation, new drivers acknowledge they have received, read and understood the sexual harassment policy in the *Driver Handbook*. CRST's written acknowledgment form provides:

> **Acknowledgment and Pledge Concerning Unlawful Harassment and Discrimination**
>
> I ACKNOWLEDGE I have received and read [CRST's] Policy Against Unlawful Harassment and Discrimination. I understand that [CRST] does not tolerate any form of harassment or discrimination at work, including sexual harassment, and any employee who is found to have violated the Policy will be subject to appropriate disciplinary action up to and including termination.
>
> I PLEDGE to conduct myself in accordance with [CRST's] [Policy] and State and Federal Law prohibiting unlawful harassment and discrimination.

Id. at 146-47 (emphases in original).

Safety trainers provide lead drivers a special training, in which CRST reemphasizes its policy against sexual harassment and other forms of unlawful employment discrimination. Since early 2008, lead drivers have watched a special DVD entitled "CRST Harassment Prevention and Reporting for Lead Drivers." Lead drivers also sign acknowledgment forms after completing their special training and watching the DVD.

In 2006, CRST began providing dispatchers with annual sexual harassment training. Prior to 2006, only operations mangers and mangers above them received annual training on sexual harassment; the only sexual harassment training dispatchers received prior to 2006 was sexual harassment training during orientation and occasional meetings with a member of the Department of Human Resources. In 2007, CRST began providing annual sexual harassment training to safety trainers, safety supervisors and recruiters.

CRST does not provide any annual training about sexual harassment to its drivers. Providing annual sexual harassment training to all drivers would be difficult, because CRST operates over a thousand tractors nationwide and on many different schedules. CRST's "workplaces" are widely dispersed.

For the past several years, however, CRST has hired outside lawyers to give in-house presentations to its employees about sexual harassment prevention.

These lawyers educate CRST's managers, including its dispatchers, about sexual harassment so the managers may conduct themselves in a professional manner and identify and report sexual harassment in CRST's workplaces. The lawyers also instruct the managers about how to deal with drivers' complaints of sexual harassment.

CRST displays posters at all company locations that include information about federal equal employment opportunity law and CRST's policy against sex discrimination, including sexual harassment and unlawful retaliation. CRST also displays posters in its truck terminals about "ReportLine," a toll-free phone number employees may call to report unprofessional, illegal and unethical behavior such as sexual harassment. The poster states:

> CRST Companies are committed to operating in a professional, safe and ethical work environment. If you are aware of anything that conflicts with our mission: Talk to your Manager; Talk to Human Resources; Or Call ReportLine. Available 24 Hours/Day, 7 Days/ Week. 1-866-207-9076. You do not have to give your name. Remember . . . We're in this for the long haul.

Id. at 148.

An independently staffed, third-party company has operated ReportLine for the benefit of CRST employees since April of 2007. All personnel-related complaints

ReportLine receives are forwarded to CRST's Human Resources Department for review. Employees may make anonymous complaints. Upon receiving a complaint forwarded from ReportLine, CRST's Human Resources Department is responsible for investigating the complaint and notifying the third-party company that CRST has taken action. ReportLine then contacts the employee to apprise her of the status of CRST's investigation. Employees who wish to remain anonymous are given a phone number they may call to receive the same information.

CRST publishes various newsletters, memoranda and other materials that reiterate and reinforce its sexual harassment policies and procedures for the benefit of its employees. For example, CRST Driving Force is an intra-company publication for office employees whose editions discourage employees from engaging in unprofessional, illegal and unethical behavior. CRST's Code of Business Conduct and Ethics states:

> [T]he work environment must be free of any form of discrimination and conduct which may be considered harassing, disruptive or intimidating. Harassment based on sex . . . is strictly prohibited. Any instances of harassment in any form are to be reported immediately to the appropriate Supervisor or the Human Resources Department.

Id. at 150.

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The Driver Handbook lists sexual harassment as a [d]ischargeable [a]ction[]." *Id.* at 149. It also reiterates that lead drivers and trainees must "comply with all CRST policies against unlawful harassment/sexual harassment and creating a hostile work environment in the workplace." *Id.* at 150.

The Office Employee Handbook ("Office Handbook") is distributed to all office staff, including all fleet managers. It includes CRST's policy against sex discrimination and other unlawful employment practices.

The Office Handbook also refers to sexual harassment as an offense subject to discipline. The 2007 version of the Office Handbook contains an "Unlawful Discrimination and Harassment (Positive Work Environment) Policy," which provides managers with detailed instructions for responding to complaints of sexual harassment.

5. *Multiple avenues for reporting sexual harassment*

CRST employs trained and experienced professionals within its Human Resources Department. CRST's human resources professionals enforce its policy against sexual harassment and other forms of unlawful employment practices.

Mr. James Barnes, Director of CRST's Human Resources Department, joined CRST in 2005 and oversees all of its sexual harassment investigations. He is ultimately responsible for ensuring that CRST's policies are enforced.

He is responsible for deciding what discipline to impose at the conclusion of each investigation. Mr. Barnes has over twenty-three years of experience in human resources, including fifteen years of conducting investigations. He attends one or two EEOC training seminars each year.

Ms. Lisa Oetken f/k/a Lisa Laveck is CRST's Human Resources Generalist. Ms. Oetken has investigated complaints of sexual harassment since 2005. CRST's Human Resources Directors trained Ms. Oetken how to conduct investigations. She also trained at the University of Iowa in employment law. She attends training on sexual harassment policy provided by CRST's outside counsel and various employment law training sessions. Further, she reads periodicals to maintain up-to-date information on sexual harassment policy and procedures.

CRST's human resources professionals have worked together to provide drivers and other employees with multiple channels for reporting sexual harassment. CRST receives complaints of sexual harassment in various ways, including:

- ReportLine.

- CRST's open door policy. CRST encourages all of its employees to approach their supervisors, any employee in the Operations Department or the Safety Departments or any manager about any issues they would like to raise. All employees, including drivers, have the ability to walk freely throughout CRST company buildings to find someone to speak with;

- Toll-free phone numbers for fleet managers. Drivers may call these phone numbers anytime to reach a fleet manager.

- Qualcomm. A Qualcomm is a device on all trucks that allows drivers to communicate directly with fleet managers while the drivers are on the road. Qualcomm messages are similar to emails but are not private; the other driver on the truck may be able to read them. They are also prone to system shut-downs and other delays.

- The Human Resources Department's nationwide toll-free phone number and local toll phone number. These phone numbers are found in the Driver Handbook.

- Evaluation forms. At the conclusion of training, trainees are encouraged to fill out an evaluation form commenting on or complaining about the lead drivers to whom they were assigned.

These multiple avenues for reporting sexual harassment place redundancies into CRST's efforts to root out sexual harassment and other unlawful employment practice in its workplaces. If a prospective complainant does not receive an immediate response from one resource, she may utilize another resource and work her way up CRST's chain of command.

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6. Response and discipline

CRST has put into place a specific protocol for dispatchers and other managers to follow upon receiving a complaint of sexual harassment. CRST informs its dispatchers of their responsibilities during training.

According to the Office Handbook, "[s]upervisors who become aware of any incidents or alleged incidents of discrimination or harassment must immediately report them to the Human Resources Director." *Id.* at 150. "Supervisors may not try to resolve allegations of such behavior on their own." *Id.* "Any supervisor who fails to report allegations of discrimination or harassment may be subject to discipline, up to and including discharge." *Id.*

The Office Handbook also defines specific procedures for supervisors when handling the complaints of drivers, who are almost always working on the road in remote locations. Namely,

> [t]he driver's responsible [dispatcher] should determine whether the driver wishes to be removed from the situation, and if so, re-assign the driver to a new lead driver or co-driver as the case may be. The [dispatcher] is to work with the Human Resources [D]epartment to arrange for the driver to make a statement of complaint.

Id. As a matter of CRST policy, a driver is never re-assigned to drive with a driver whom she claims sexually harassed her.

For example, when a dispatcher receives a call, Qualcomm, or other communication from a driver who alleges that one of her co-workers has sexually harassed her, the dispatcher must first determine whether the driver is safe or needs to be separated from the alleged harasser. One of CRST's relevant policy documents provides:

> The driver's responsible [dispatcher] should determine whether the driver wishes to be removed from the situation, and if so, re-assign the driver to a new lead driver or co-driver as the case may be.

Id. at 152. Dispatchers "may not try to resolve allegations of [incidents of discrimination and harassment] on their own." *Id.* at 153.

Under CRST's policy, dispatchers ought not spend time deciding whether the allegations are valid or try to resolve the sexual harassment issue before removing the complainant from the offending environment. CRST's policy requires dispatchers to provide an immediate response when approached with an allegation of sexual harassment. CRST does not provide dispatchers with specific training on how to remove complainants from tractors when an allegation of sexual harassment arises. However, CRST gives its dispatchers the tools and support necessary to provide an immediate response to alleged victims of sexual harassment. Dispatchers are authorized to arrange for a hotel room for the alleged victim, and for transportation, including a cab, rental car, bus ticket or other transportation, depending on which would separate

the alleged victim from the environment as soon as reasonably possible. Management supports dispatchers' decisions to make these accommodations.

Dispatchers may arrange to move the alleged victim to the nearest safe location or terminal as soon as reasonably practical, even if the alleged victim indicates she feels safe and does not need to be extricated from the situation immediately. If the alleged victim does not feel safe but does not think she can safely get off her truck, it might be necessary for the dispatcher to "manufacture" a scenario that requires the truck to stop at a terminal or rendevous with another CRST tractor. Alternatively, if the alleged victim's allegations warrant such action, the dispatcher may recommend that the driver contact the local police to safely recover personal belongings from the truck or to notify them of possible criminal behavior.

Human Resources Department personnel must investigate all reported harassment complaints. CRST may respond to sexual harassment allegations with a variety of disciplinary actions, including (1) verbal warnings, (2) written warnings, (3) counseling sessions with Human Resources personnel, (4) removal of lead driver certification, (5) restrictions preventing the alleged offender from driving with certain groups of drivers and (6) termination.

CRST often restricts alleged harassers from driving with women for at least six months. When a driver is restricted from driving with a woman, a notification stating "No Females" is placed on his "Five Screen."

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A Five Screen is a record appearing in the company's computer database. Dispatchers may view the driver's Five Screen before arranging driver pairs. The Five Screen thus alerts dispatchers that the driver should not be assigned to drive with women. CRST's policy is for dispatchers to enter the restriction on the Five Screen so that they are aware of the restriction for the drivers who report to them. Reinstatement occurs only upon the driver's request and if approved by Mr. Barnes.

7. Incidence of sexual harassment among CRST's drivers

From January 1, 2005 through September 8, 2008, CRST employed 2,701 female drivers who were teamed on at least one occasion with at least one male driver. In the same period, 146 of CRST's female drivers alleged sexual harassment by at least one male driver. Those 146 female drivers represent 5.4% of the total 2,701 female drivers employed by CRST who were teamed with at least one male driver during the period.

Over the same time period, there were 6,978 female-male driving teams. The 146 female drivers made a claim of harassment involving 188 of these teams. Therefore, 2.7% of all female/male teams involve a complaint of sexual harassment.

The 6,978 female/male teams drove a total of 373,841 trips during the January 1, 2005 through September 8, 2008 period. The 188 teams that include a claim of harassment made 3,121 trips. Therefore, 0.8% of the total

number of trips involved teams in which a complaint of sexual harassment was made.

The 6,978 female/male teams drove a total of 684,581 days. The teams that include a claim of harassment drove 5,826 days. Therefore, 0.9% of all days driven involved teams where a complaint of sexual harassment was made.

The 6,978 female/male teams drove a total of 226,445,880 miles. The teams where a claim of sexual harassment was made represent 1,804,804 miles. Therefore, 0.8% of all the miles driven were by teams where a complaint of sexual harassment was made.

Although some women testified that they had heard of the sexual harassment of other female drivers by their trainers and co-drivers, no female driver observed the sexual harassment of another female driver. There is no evidence any of CRST's managers sexually harassed drivers. Likewise, there is no evidence anyone sexually harassed CRST female managers. The unwelcome and offensive conduct by co-drivers and lead drivers generally occurred on the road in remote locations, not in CRST's corporate offices.

These cold statistics do not tell the entire story. The 146 female drivers variously suffered physical, mental and/or emotional abuse at the hands of their male co-drivers and lead drivers. Among other things, their coworkers subjected them to (1) sexually charged comments; (2) verbal abuse; (3) pornography; (4) graphic stories about sex, including the rape of a child; (5) propositions for sex;

(6) urination;[12] (7) exposed penises; (8) masturbation; (9) offensive touching, including unwanted "brushing up," kissing, hugging and patting; (10) crawling into women's bunks uninvited; (11) physical abuse, including punching, kicking, grabbing, fondling and rape; (12) theft of underwear; (13) threats of reprisal if the women did not accede to their sexual demands, including threats that trainees would not graduate to co-driver status; (14) ordering women off of the truck; (15) tossing their belongings out of the cab; and (16) parking the tractor in isolated or otherwise "bad" areas.

8. CRST's responses to specific situations

Much less clear is (1) the extent to which the 146 women informed CRST about the sexual harassment they suffered, *e.g.*, the timeliness and breadth of their complaints in relation to the allegedly offensive conduct to which the women were subjected; and (2) CRST's responses to each complaint. The parties have not compiled this evidence in any meaningful way for the court. After reading thousands of pages of deposition testimony and other documents in conjunction with the parties' Local Rule 56 individual statements of material fact,[13] the court is only able to draw the following, mostly

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12. Although urination is not "clearly sexual in nature" and lacks "explicit sexual overtones," the sight of it may nonetheless form the basis for a hostile work environment sexual harassment claim. *Hall*, 842 F.2d at 1014.

13. For example, the EEOC's appendix is over 1,300 pages long. Many of the pages contain four "scrunched" deposition pages.

general conclusions about CRST's responses to its female drivers' complaints of sexual harassment:

- CRST investigated at least 172 complaints of sexual harassment between January 1, 2005 and October 15, 2008. The vast majority of CRST's investigations did not result in any determination on the part of the Human Resources Department as to whether sexual harassment actually occurred. When deciding whether sexual harassment allegations were true, CRST was often faced with the classic "he said/she said" situation.

- At least one male driver was fired after he admitted to sexually harassing a female coworker. Further, CRST barred dozens of other male drivers from driving with women. This "no females designation" did not alter the male drivers' rates of pay. On occasion CRST inadvertently allowed a driver with "no females designation" to drive with women.

- In many instances CRST's dispatchers responded to female drivers' complaints of sexual harassment with compassion and in compliance with CRST's policy against sexual harassment. Dispatchers offered and/or made arrangements to extricate drivers from their tractors and harassers as soon as possible. Dispatchers offered to pay or paid for expenses such as travel, lodging and medical care after extrication. Dispatchers reassigned female drivers to new trainers or co-drivers. Many of the women who testified in this case did not fault

CRST or its dispatchers for the handling of their complaints of sexual harassment.

- Some female drivers opted to remain in their tractors with their harassers while CRST tried to help them. These female drivers apparently prioritized their finances over possible further exposure to sexual harassment; under the split-mileage rate and CRST's other policies, all drivers had a financial incentive to remain on their tractors and keep them moving. Rather than extricate complainants from their tractors as soon as possible, some dispatchers agreed to re-route the female drivers' tractors or to make other appropriate, delayed arrangements so long as the female driver was willing and not in imminent physical danger.

- Some of CRST's dispatchers and other managers violated CRST's policy against sexual harassment. For example, some dispatchers occasionally failed to report complaints of sexual harassment to the Human Resources Department. They tried to remedy situations themselves or, out of laziness or negligence, shifted the burden to the complainant to pursue the matter with higher-level management. Conversely, CRST's Human Resources Department often failed to communicate with complainants about the status of their sexual harassment complaints and whether CRST imposed discipline upon the accused.

- On occasion CRST's dispatchers failed to protect female drivers from sexual harassment. The court cannot detect any pattern to the dispatchers' failings; the circumstances surrounding each case vary widely. Some dispatchers were lazy and "punted" the complainants to other dispatchers. Some dispatchers did not believe some of the allegations of sexual harassment and for this reason failed to make appropriate arrangements to extricate the women from their tractors. (At times skepticism filtered up into the Human Resources Department; when one woman told Mr. Barnes and Ms. Oetken that a male driver raped her, Mr. Barnes rolled his eyes and asked rhetorically: "So how much is this going to cost?" Pl. App'x at 377.) Other times dispatchers encouraged complainants to tolerate the harassment until they delivered their cargo at its intended destination. Sometimes dispatchers pointed out (1) it might take CRST longer to reassign the alleged harasser than it would for the team to deliver the cargo; (2) drivers are not paid while waiting for reassignments; and (3) drivers who leave their tractors without permission from CRST are subject to termination for "abandonment." On rare occasions dispatchers affirmatively thwarted the female drivers' complaints of sexual harassment. For example, one female driver told her dispatcher that her co-driver forced her to perform oral sex on him. The dispatcher, a friend of the co-driver, failed to respond to her complaint. Another dispatcher betrayed a female driver and informed her harasser of her complaint.

- CRST does not keep track of drivers' complaints about dispatchers failing to respond appropriately to sexual harassment complaints. CRST has never fired a dispatcher for mishandling a driver's complaint of sexual harassment.

D. Arguments

1. Motion

In the Motion, CRST asks the court to dismiss the EEOC's "pattern or practice claim." CRST contends that the EEOC has not met its burden under Federal Rule of Civil Procedure 56 and *Celotex* to present sufficient evidence in support of such claim. Specifically, CRST posits a reasonably jury could not find "(1) that CRST's everyday workplace is permeated with sexual harassment so severe or pervasive that it alters the terms of employment of its female drivers; or (2) that CRST's management has a policy of tolerating an atmosphere of severe or pervasive sexual harassment throughout the workplace." Def.'s Br. at 4. CRST proceeds on the assumption that lead drivers are coworkers, not supervisors.

As a threshold matter, CRST points out that the EEOC "elected to offer no affirmative expert evidence, statistical or otherwise, in support of its claims" and thus "attempt[s] to meet its imposing affirmative burden by citing what it contends are 'too many' complaints of sexual harassment by CRST's female drivers without putting any of its evidence into a statistically meaningful context." *Id.* at 5. CRST contends that the EEOC only "offer[s]

episodic evidence contending that CRST management should be doing a better job of preventing sexual harassment complaints, investigating them, disciplining offenders, helping alleged victims, training drivers about sexual harassment, and following its own policies and procedures." *Id.* In other words,

> instead of providing evidence of a discriminatory corporate policy or intentionally discriminatory decisions by CRST's officers and directors, [the] EEOC rests its case against CRST on *ad hoc* individual claims that amount to neither a pattern nor a practice. An intentional company-wide policy tolerating all pervasive sexual harassment cannot justifiably be inferred simply from the number of individual claims that [the] EEOC is pursuing in this case.

Id. at 11. To rebut this "episodic evidence," *id.* at 5, CRST points the court to its own expert evidence (set forth in Part IV.B.7 *supra*), which establishes that the incidence of sexual harassment complaints among CRST's female drivers is very low--regardless of whether such complaints are viewed in relation to the total number of female employees, the total number of male-female driver teams, the total number of trips taken or the total number of miles traveled.

CRST stresses that it is undisputed that it has a longstanding, official policy against sexual harassment. CRST actively enforces this policy. CRST points to its repeated and myriad efforts to train its employees

that sexual harassment is wrong and that CRST does not tolerate it. CRST also points out that it provides its employees with many different avenues to report sexual harassment. Each CRST administrator and manager has testified that CRST does not tolerate sexual harassment in the workplace and affirmatively seeks to root it out. While CRST does not dispute that the EEOC may have presented evidence of isolated individual incidents of sexual harassment and uncovered some of the failings of its policies and procedures, the EEOC has not shown, in the words of the Supreme Court, that it is CRST's "standard operating procedure" to tolerate the sexual harassment of its female drivers. *Teamsters*, 431 U.S. at 336). CRST accuses the EEOC of doing little more than "second guessing CRST's existing policy and enforcement procedures against sexual harassment." Def.'s Br. at 5.

CRST points out that, unlike every other case in which a court found sufficient facts for a jury to infer an employer had a pattern or practice of unlawful employment discrimination, in this case there is comparatively little evidence--statistical or otherwise--of unlawful discrimination. The incidence of unlawful discrimination pales in comparison to other cases; in *Teamsters*, for example, the United States presented stunning evidence that the defendant-company employed virtually *no* members of certain races in preferred jobs. The company's inability to rebut the inference of discrimination resulted from "'the inexorable zero.'" *Teamsters*, 431 U.S. at 342 n.23 (citation omitted).

CRST stresses that its "workplace" is widely

dispersed. CRST argues this fact is a special consideration for the court in deciding whether CRST has engaged in a pattern or practice of tolerating sexual harassment. CRST argues:

> Here, the workplace is not a single facility in which many women employees may be subjected to harassment by the same group of male employees in the same manner for an indefinite period. Instead, CRST's operations involve two-person teams driving trucks far removed from management's ability to observe or control interpersonal conduct. CRST cannot learn or act upon a complaint of sexual harassment from a female driver unless and until she first reports it.

Id. at 12-13. CRST contends that this case is "closest" to *EEOC v. Carrols Corp.*, No. 5:98-CV-1772, 2005 U.S. Dist. LEXIS 8337, 2005 WL 928634 (N.D.N.Y. Apr. 20, 2005) (dismissing pattern or practice claim against employer where alleged harassment occurred at 206 different Burger King restaurants) and factually distinguishable from other cases involving allegations of unified workplaces with widespread, pervasive sexual harassment of which the employer must have been aware, including *Jenson*, *Mitsubishi* and *Dial*.

2. *Resistance*

The EEOC resists the Motion in its entirety. The EEOC alleges that, "[s]ince at least 1997, CRST has

tolerated a pattern or practice of sexual harassment of its female truck drivers." Brief in Support of Resistance ("Pl.'s Br.") (docket no. 168-1), at 4. In response to a pending motion the EEOC adopts an even wider view; proceeding on the premise that there is no statute of limitations for "pattern or practice claims" (under either §§ 706 or 707), the EEOC promises at trial "to show that the pattern or practice which existed between January 1, 2005 and the present extended back indefinitely." Lim. Br. at 6. The EEOC apparently intends to seek relief for women sexually harassed as early as 1997 and who have not worked at the company for over ten years. *See id.* ("EEOC has always told CRST that it intends to prove the pattern for a period as far back as the evidence warrants.").

The EEOC accuses CRST of "treat[ing] sex harassment as nothing more than a distraction from the business of moving freight." Pl. Br. at 6. The EEOC recounts female drivers' individual accounts of sexual harassment over the years. Characterizing lead drivers as the trainees' "supervisors" for purposes of Title VII, the EEOC concludes that "CRST is vicariously liable for sexual harassment perpetrated by its trainers, subject to an affirmative defense in cases where the harassment did not culminate in tangible employment action[.]" *Id.* at 10 (referencing *Faragher-Ellerth* doctrine).

The EEOC dismisses CRST's criticism that it has not presented expert testimony or sophisticated statistical evidence to show a pattern or practice of sexual harassment at CRST. The EEOC opines that "[i]t is not essential that a pattern or practice be supported

by statistical proof[.]" *Id.* at 12. In any event, the EEOC states that simple math (a numeral tally of the evidence of incidence of complaints of harassment) shows that "[t]he undisputed evidence demonstrates that a minimum of *254* women, or *9.4 percent* of all of CRST's female drivers, have complained of sexual harassment by their trainers or co-drivers" and "the harassment they experienced was severe or pervasive." *Id.* (emphasis in original).

The EEOC criticizes CRST's sexual harassment policy as deficient. Although the EEOC falls short of calling the policy a ruse to hide discrimination, it argues:

> CRST has not changed its policy of sex harassment for drivers for many years. . . . . [T]he policy itself is evidence of CRST's neglect. It does not identify most of the often-repeated behaviors that violate it, including trainers seeking sex in exchange for a passing grade, men assaulting women, men urinating into containers in view of women, men exposing themselves to women, and masturbation. It does not give women the name of a person to contact for complaints. It does not say what to do when a woman is unable to complain because of the known roadblocks to reporting: fear of the trainer or co-driver, lack of Qualcomm training, lack of a cell phone, or off-hours unavailability of CRST personnel. It does not state who the woman's "supervisor" is, or state that the trainer is not her supervisor. It does not say whether and when a woman may be removed

> from the truck if she is uncomfortable due to a sexual advance or other sexual misconduct. And it does not say to anyone--trainers, trainees, or fleet managers--that sexual harassment should "never happen[.]"

Id. at 18-19 (citations omitted).

The EEOC also calls into question CRST's sexual harassment training. The EEOC opines that CRST's trainings are too brief, not presented seriously and not repeated enough. The EEOC points out that drivers do not receive annual sexual harassment training after their orientations, and CRST only introduced annual training for managers in the last few years.

The EEOC contends that CRST fails to protect its female drivers, as its supervisors' failures to follow the policy on all occasions attests. The EEOC also points out that nearly all of CRST's investigations result in no factual finding as to whether sexual harassment in fact occurred. Further, CRST "does not impose any meaningful discipline on those accused of sexual harassment." *Id.* at 23. The EEOC points out that, "[o]f the 157 complaints of sexual harassment made by women . . . only 69, or 44%, resulted in a designation of [sic] that the male harasser should not drive with women in the future." *Id.* The EEOC concludes that CRST has a "nod/wink effort at discipline [that] sends a message to harassers that they may freely harass and are likely to get away with it, given the intrinsically coercive atmosphere on the truck, and even if it is reported, they lose nothing." *Id.* The EEOC

notes that CRST does not actively monitor its "no females" designation and contends the firing of only one male driver for sexual harassment over the years "shows that it is nearly impossible to get fired for sex harassment." *Id.* at 23-24. The EEOC concludes that CRST is aware that harassment is routine but does not take action to decrease its incidence.

At bottom, the EEOC alleges CRST tolerates sexual harassment for profit. The EEOC summarizes its argument as follows:

> CRST knows that its female drivers are sexually assaulted, propositioned, groped, and exposed to masturbation with frightening frequency and regularity. It has not taken action to decrease the frequency by working to prevent their occurrence or by disciplining the perpetrators. Instead, it concludes that its sexual harassment policy is successful because so many women follow the company's complaint procedure and make complaints of sexual harassment. In other words, CRST's policy works *because so many women are being sexually harassed.* The result of CRST's failure to recognize that a large number of complaints indicates that it has a sexual harassment problem is predictable and widespread. Nearly one out of every ten female drivers who gets on a truck with a male driver at CRST will complain of being sexually harassed. Whether that is sufficient to declare CRST's policy and practice a pattern or practice of discrimination under Title VII should be for the finder of fact to determine.

Id. at 26-27 (emphasis in original).

3. Reply

In its Reply, CRST repeats many of the arguments in its Motion. Among other things, CRST also accuses the EEOC of (1) grossly distorting the evidence before the court by misstating the deposition testimony of a small number of class members; (2) inappropriately

relying on the complaints of the 99 "class members" whom it failed to produce for deposition to inflate the incidence of harassment; (3) nitpicking and quibbling with alleged deficiencies in its sexual harassment policies and procedures without citing any legal authority therefor; and (4) attempting to micro-manage its business.

E. Analysis

For the reasons set forth in CRST's Motion and Reply, the court holds that the EEOC has presented insufficient evidence to show that CRST has engaged in a pattern or practice of tolerating sexual harassment of its female drivers. Based upon the record presently before the court, a reasonable jury could not find that it is CRST's "standard operating procedure" to tolerate sexual harassment. *Teamsters*, 431 U.S. at 336. To be certain, the EEOC has presented the court with anecdotal evidence that some of CRST's managers occasionally failed to deal appropriately with female drivers' complaints of sexual harassment over the years. While this may subject CRST to liability as to individual women at trial, the EEOC has not presented sufficient evidence to show that tolerating sexual harassment was "the regular rather than the unusual practice" at CRST. *Id.* The EEOC is not entitled to *Jenson II*'s modified burden-shifting framework.

It is undisputed that tolerating sexual harassment is not CRST's official policy. To the contrary, at all relevant times CRST has had a facially valid anti-sexual harassment policy, which it distributed to its employees. "Distribution of a valid [anti-sexual harassment policy]

provides compelling . . . proof of preventing sexual harassment." *Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007). Further, CRST ensured its employees received specific training on its anti-sexual harassment policy. *See id.* (characterizing as "most important[]" the fact an employee "received training specifically about [an anti-sexual harassment] policy"). CRST's anti-sexual harassment policy makes clear that sexual harassment will not be tolerated in CRST's workplaces. Further, it is specific and detailed and provides potential complainants with multiple avenues to report sexual harassment. All of these undisputed facts weigh against a finding that it is CRST's standard operating procedure to tolerate sexual harassment of its female drivers. *See, e.g., id.; Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999) (lauding an employer's anti-sexual harassment policy, which "made clear [the employer's] stand that sexual harassment will not be tolerated, . . . provided for multiple mechanisms for the prompt resolution of complaints" and was "both specific and detailed").

The EEOC's criticisms of CRST's anti-sexual harassment policy are not well-taken. The EEOC devotes nearly eight pages of its Resistance to nitpick various aspects of CRST's anti-sexual harassment policy and practices. For example, the EEOC faults one written version of CRST's policy because it fails to state with specificity that "seeking sex in exchange for a passing grade" and "men exposing themselves to women" constitute sexual harassment. The problem with the EEOC's argument--apart from the fact that it should

be obvious to any reasonable person that "seeking sex in exchange for a passing grade" and "men exposing themselves to women" constitute sexual harassment--is that the EEOC does not cite a *single case, statute or other legal authority* in any of the eight pages of argument. To show a pattern or practice of unlawful employment practices, the EEOC must do more than quibble with alleged deficiencies in CRST's anti-sexual harassment policy and practices. It must cite legal authority.

The incidence of sexual harassment against CRST's female drivers--no more than 5.4% of the total 2,701 female drivers employed by CRST who were teamed with at least one male driver during the relevant period, 2.7% of all female/male teams, 0.8% of the trips taken, 0.9% of all days driven or 0.8% of all the miles driven[14]--is not so high as to lead to a reasonable inference that CRST's anti-sexual harassment policies and practices are a ruse to hide a pattern or practice of tolerating sexual harassment.

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14. These are conservative estimates made in the EEOC's favor. The percentages set forth in Part IV.C.7 *supra* will decrease (1) if the court or the jury later determines that some of the women who have testified in this case did not experience severe or pervasive sexual harassment or (2) if the court adopts the EEOC's contention that § 706 lacks a statute of limitations and the pattern or practice began in 1997 instead of 2005. *Cf. Craik*, 731 F.2d at 481 (affirming district court's finding that class-wide sexual harassment did not exist when plaintiffs proved "about 50 incidents which occurred over a ten-year period"). The court notes that the court in *Carrols* did not make these assumptions in the EEOC's favor but nonetheless granted summary judgment in the defendant-employer's favor. 2005 U.S. Dist. LEXIS 8337, 2005 WL 928634, at *4-*5.

Appendix O

There is insufficient admissible evidence in the record for a reasonable jury to find it was standard operating procedure at CRST to tolerate sexual harassment. *Joens*, 354 F.3d at 940 (quoting *Dhyne*, 184 F.3d at 987). The incidence of unlawful employment activity is a far cry from *Teamsters* and its "inexorable zero." 431 U.S. at 342 n.23 (citation omitted).

The EEOC has not presented the court with any expert evidence, statistics or legal authority to support its argument that there is so much sexual harassment of CRST's female drivers that CRST must tolerate sexual harassment. Surprisingly, the EEOC has not offered any of its own statistical or expert evidence in this case; the Supreme Court and the various circuit courts of appeals have long recognized that such evidence is usually an important component of proof in a pattern or practice case. *See, e.g., Teamsters*, 431 U.S. at 339 ("[O]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." (Citations omitted.)); *Catlett*, 828 F.2d at 1266 (reiterating that statistical evidence was important because it "serve[d] to reinforce the suggestion that these discriminatory incidents were not isolated or sporadic but were representative of Missouri's standard operating procedure"); *Craik*, 731 F.2d at 470 (stating that in pattern or practice cases the plaintiff "[n]ormally" will offer statistical evidence); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) ("[I]n a pattern or practice case, the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's 'standard operating

procedure.'"); *Jenson II*, 824 F. Supp. 874-88 (relying heavily on plaintiff's expert testimony).

The court does not suggest that statistical evidence is necessary to prove a pattern or practice claim. "Either [statistical or anecdotal evidence recounting specific instances of discrimination] alone may be sufficient to establish a pattern or practice of discrimination." *Catlett*, 828 F.2d at 1265. In *Teamsters*, the Supreme Court further cautioned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances." 431 U.S. at 340. There may yet be truth in Mark Twain's observation that "[t]here are three kinds of lies: lies, damned lies, and statistics"; the problem is that the EEOC has not given the court any evidence to disprove CRST's statistical evidence. But the EEOC may not turn Rule 56 and *Celotex* on their heads and simply piggyback on CRST's evidence.[15] In this regard the EEOC's argument boils down to little more than its bald assertions that CRST's business model is "intrinsically coercive" and the incidence of sexual harassment among CRST's female drivers is shockingly high. Yet attorney argument is not evidence, *Exeter Bancorp., Inc. v. Kemper Secs. Group, Inc.*, 58 F.3d 1306, 1312 n. 5 (8th Cir. 1995) (reiterating that statements of counsel are not evidence and will not carry the day on a motion), and "[e]vidence, not contentions, avoids summary judgment." *Reasonover*, 447 F.3d at 578.

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15. Making matters worse, the EEOC attempts to inflate CRST's own evidence by asking the court to consider inadmissible complaints of sexual harassment.

Appendix O

It is important to remember that CRST's lead drivers were the trainees' coworkers, not their supervisors. It is true the EEOC presented anecdotal evidence to show CRST almost exclusively relied upon the observations of lead drivers when deciding whether to promote trainees to co-driver status. For example, Mr. Barnes informally characterized the relationship between lead drivers and trainees during EEOC administrative proceedings as "really no different than the role of supervisors in other industries and organizations." Pl.'s App'x at 831. The EEOC also presented anecdotal evidence to show some trainees believed their lead drivers possessed supervisory status. Notwithstanding such anecdotal evidence, it is undisputed that--in fact--final authority to hire, fire, promote, demote or reassign trainees did not rest with lead drivers. Absent proof such authority rested with lead drivers, lead drivers are not "supervisors" for purposes of Title VII. *See Merritt v. Albemarle Corp.*, 496 F.3d 880, 883-84 (8th Cir. 2007) ("[T]o be considered a supervisor, the alleged harasser must have had the power . . . to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." (Citation omitted.)). Indeed, the Eighth Circuit Court of Appeals explicitly rejected the EEOC's broad interpretation of supervisory status in a similar case. *See, e.g., Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056-57 (8th Cir. 2004) (holding that a "team leader" with the authority "to assign employees to particular tasks" was not a supervisor and specifically rejecting the EEOC's broader interpretation of supervisory status). The Eighth Circuit Court of Appeals has also indicated that "apparent authority would be an insufficient basis

to support a finding of supervisor status." *Id.* at 1057 n.7 (citing *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999)). The court may not hold CRST strictly liable for the conduct of its lead drivers or co-drivers.

The EEOC has presented the court with anecdotal evidence to show that some members of CRST's management occasionally violated CRST's anti-sexual harassment policy by failing to respond appropriately to sexual harassment in the workplace. (Those facts are set forth in Part IV.C *supra* and need not be repeated here.) However, the EEOC has not compiled the failings of CRST's managers in any meaningful way to show that CRST has a pattern or practice of tolerating sexual harassment in its workplace. Absent such initiative on the part of the EEOC, there is nothing in the record which a reasonable jury might cobble together to show these failures were part of a *pattern or a practice* of tolerating sexual harassment instead of merely isolated or sporadic failures over the course of four (or perhaps twelve) years.

This case is manifestly unlike *Jenson II*. Apart from the EEOC's failure to present expert statistical evidence of, for example, "sex stereotyping" and its failure to compile the evidence in a meaningful fashion for the court, there is simply no evidence in the record that men occupied virtually every supervisory and managerial position and created a "sexualized environment" for their female subordinates. 824 F. Supp. at 885. There is no evidence women worked in a largely unified work environment in which "[v]irtually all of the relevant testimony and evidence indicates that male employees, [including first-

line supervisors,] felt free to and did exhibit sexually-focused material anywhere they chose." *Id.* at 880. There is no evidence CRST failed to establish a system for processing sexual harassment complaints. CRST assigned members of its management the responsibility to curtail sexual harassment in the workplace and has made repeated efforts to communicate with its employees that sexual harassment is wrong.

The EEOC excoriates CRST's Human Resources Department for failing to make formal findings of fact and, based upon such findings, discipline harassers. The EEOC's argument ignores reality and settled Eighth Circuit Court of Appeals case law. The EEOC's argument ignores reality by confusing CRST with a court or some other body empowered by law to make such findings. Unlike a court or administrative organization such as the EEOC, CRST's Human Resources Department does not possess the power to compel sworn testimony under penalty of perjury. It should come as no surprise to the EEOC, then, that CRST's investigations do not always produce sufficient information upon which to base a decision as important as deciding whether an employee should be fired for misconduct. Many adjudicative bodies, including the EEOC, who possess such powers are themselves unable to reach conclusions of ultimate fact in every case.

The EEOC's argument ignores settled Eighth Circuit Court of Appeals case law. "[T]here is no 'requirement that the employer credit uncorroborated statements the complainant makes if they are disputed by the alleged harasser.'" *Adams*, 538 F.3d at 930 (citation omitted)).

While the court must assume all of the female drivers' allegations to be true for purposes of Rule 56, it does not follow that CRST's dispatchers or other managers were required to have done the same if and when those women reported their allegations in accordance with CRST's anti-sexual harassment policy. Because of the relatively unique nature of CRST's "workplace," nearly every complaint of sexual harassment creates the classic "he said/she said" situation. Even if CRST's Human Resources Department were a court or other adjudicative body, justice is due to the accuser *and* the accused. *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (Cardozo, J.). As it is, it appears to be CRST's policy and usual practice to bar alleged harassers from driving with women without making formal factual findings.

Of the reported pattern or practice cases decided at the summary judgment stage, this case is most similar to *EEOC v. Carrols Corporation*, No. 5:98-CV-1772, 2005 U.S. Dist. LEXIS 8337, 2005 WL 928634 (N.D.N.Y. Apr. 20, 2005). In *Carrols*, The EEOC brought a pattern or practice hostile work environment sexual harassment case[16] against an employer who also had a widely dispersed "workplace"--the employer owned and operated 350 Burger King restaurants in sixteen states. 2005 U.S. Dist. LEXIS 8337, 2005 WL 928634, at * 1. The district court set forth the following criteria for determining whether it was the employer's "standard operating procedure" to tolerate sexual harassment:

> Neither statute nor case law provides a

16. The court notes that in *Carrols* the EEOC filed suit under both §§ 706 *and* 707.

> definitive list of the relevant circumstances that a court should consider. However, in a particular case, the nature of the plaintiff's offered proof and the nature of the defendant's business operations will indicate that certain criteria are relevant.
>
> * * *
>
> [Here,] the Court must compare the number of allegations to the total number of Defendants' female employees during the relevant period. The Court must also consider the number of years over which the allegations arose. Furthermore, the Court must examine certain aspects of the allegations and Defendant's workplace that are relevant to the issue of how the alleged conduct would affect the reasonable woman, e.g. whether the alleged harasser was a supervisory employee, whether the alleged harasser was likely to remain in Defendant's employ for a significant period of time, and whether the alleged victim was aware of conditions in Defendant's restaurants outside of the one in which she worked.

2005 U.S. Dist. LEXIS 8337, [WL] at *2.

The district court then applied these criteria to the facts before it in the summary judgment record. First, turning to the facts, the district court held that, at most, a reasonable jury could find 333 of 90,835 employees at a total of 206 distinct restaurants had suffered sexual harassment. 2005 U.S. Dist. LEXIS 8337, [WL] at *4.

This amounted to .367% of the women the defendant had employed during such time-frame. *Id.* Second, the district court found that the harassment occurred over an eight-year period. Third, the district court pointed out that the employer had high turnover and most of its female employees did not work at more than one restaurant. *Id.* As a consequence, the district court observed:

> Plaintiff . . . argues that a statistical analysis of its submissions is misleading because multiple discrete incidents of sexual harassment may result in a cumulative level of hostility in the work environment greater than that indicated merely by counting the incidents. However, the strength of this argument depends upon whether the alleged victims are aware of the discrete incidents. Certainly a woman who has never directly been subjected to harassing conduct, but who is aware that other female co-workers have been so subjected, may reasonably regard her work environment as hostile. However, in the instant case, Plaintiff's submission indicate[s] that most of Defendant's female employees did not work at more than one restaurant. Consequently, they knew little of Defendant's policies and practices and the experiences of Defendant's employees beyond what they saw in their individual restaurants. Therefore, the multiplying effect of incidents of sexual harassment is substantially weaker in this case than it is in cases involving more unified work environments and workforces.

Id.; see also Jones v. Flagship Int'l, 793 F.2d 714, 721 n.7 (5th Cir. 1986) (cited with approval in *Hall*, 842 F.2d at 1015, for the proposition that "incidents of sexual harassment reported by other females bear on plaintiff's claim only if there is evidence that incidents affected plaintiff's psychological well-being")). Fourth, the district court noted that 69 of the alleged incidents of sexual harassment involved non-supervisory employees and another 53 against low-level supervisors. *Id.* Fifth, the district court pointed out that, whereas the EEOC had failed to compile evidence to establish the number of harassers still in the defendant's employ, the defendant had affirmatively presented evidence to show it had fired, suspended or otherwise disciplined dozens of alleged harassers. 2005 U.S. Dist. LEXIS 8337, [WL] at *5.

The district court rejected the EEOC's argument that statistical evidence in a sexual harassment pattern or practice case was misleading. 2005 U.S. Dist. LEXIS 8337, [WL] at *4. Although the district court conceded it was unable to "articulate a specific threshold for the number of claims that is necessary to establish a pattern or practice of sexual harassment," the district court pointed out that not "even a substantial minority of Defendant's female employees experience harassment." *Id.* The court district held that the EEOC's evidence "f[e]ll *well short* of what is required" and granted the employer's motion for summary judgment as to the EEOC's pattern or practice claims of sexual harassment. *Id.* (emphasis added).[17]

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17. *Carrols* is still pending before the district court more than a decade after the EEOC filed it.

The same analysis applies with equal--if not greater force--here. The EEOC has presented the court with insufficient evidence to survive summary judgment on its "pattern or practice claim." While the incidence of sexual harassment is apparently higher here than in *Carrols*, not even a substantial minority of Defendant's female employees experienced harassment. Further, apparently unlike the Defendant in *Carrols*, this defendant has adopted policies and procedures to forestall harassment. This is not a case of "systemic, company-wide discrimination" or "an objectively verifiable policy or practice of discrimination by a private employer against its employees." *Mitsubishi*, 990 F. Supp. at 1070.

In any event, application of the *Teamsters* burden-shifting framework as modified by *Jenson II* would appear to present special difficulties in the instant case. Burden shifting in pattern and practice cases is justified in large part upon the premise that "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." *Teamsters*, 431 U.S. at 359. Here, CRST does not operate a unified workplace. Its workplaces are largely the cabs of hundreds upon hundreds of semi-truck tractors. As a consequence, there is little reason to assume all allegedly aggrieved persons were subjected to the same harm, just as a court might presume in the mine-run case with a unified workplace. *Cf. Teamsters*, 431 U.S. at 360 & n.45 (appearing to recognize that the burden-shifting paradigm might not be appropriate in all pattern or practice cases if the determination at the liability phase did not "create

a greater likelihood that any single decision was a component of the overall pattern"); *Craik*, 731 F.2d at 471 n.9 (discussing the theoretical underpinning of the burden of persuasion shift in *Teamsters*). There is even less reason to assume that CRST is in a superior position to gauge the subjective experience of each female driver than the female driver herself. *Cf. Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069, at *15 ("[E]ach individual claimant should have knowledge of the specific harassment she experienced . . . . [S]hifting the burden . . . does not make sense under *Teamsters*" in a sexual harassment case.)).

Accordingly, the court holds that the EEOC has not established a pattern or practice of tolerating sexual harassment. Therefore, the EEOC will not be permitted to avail itself of the *Jenson II* burden-shifting framework at trial. Nothing in this opinion, however, should be construed as a final ruling on the individual claims of sexual harassment that the EEOC presses in this action. At trial, the EEOC may be able to prove CRST is liable for sexual harassment as to individuals and obtain the equitable and other relief it seeks on their behalf. *Cf. Catlett*, 828 F.2d at 1265 ("[A] class claim may fail despite proof of discrimination against one or more individuals[.]").

V. CONCLUSION

The Motion (docket no. 150) is **GRANTED.** To the extent that the EEOC asserts a "pattern or practice claim" in this litigation against CRST, such claim is **DISMISSED WITH PREJUDICE.** The EEOC shall pay

CRST's ordinary costs. CRST may file its request for costs **10 court days** after the disposition of the entire case.

IT IS SO ORDERED.

DATED this 30th day of April, 2009.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX P — CRST'S RESPONSE TO EEOC'S STATEMENT OF ADDITIONAL MATERIAL FACTS, IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, FILED MARCH 31, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-95

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARKE, LATESHA THOMAS, and NICOLE ANN CINQUEMANO,

Plaintiffs/Interveners,

v.

CRST VAN EXPEDITED, INC.,

Defendant.

DEFENDANT CRST VAN EXPEDITED, INC.'S RESPONSE TO EEOC'S STATEMENT OF ADDITIONAL MATERIAL FACTS WHICH PRECLUDE SUMMARY JUDGMENT ON EEOC'S PATTERN OR PRACTICE CLAIM

Appendix P

* * *

The Extent of Sexual Harassment at CRST

271. CRST received at least the following number of complaints of sex harassment by female drivers against males:

2005: 54 complaints

2006: 32 complaints

2007: 49 complaints

2008 (through October 15): 47 complaints

(CRST Second Supplemental Answers to EEOC's Second Set of Interrogatories, 02-23-09, EEOC P/P App. 611-624)

Based on these numbers, CRST had a total of 182 complaints of sex harassment by female drivers against males during this period, which constitutes 6.7% of all women driving with men. (Campion Dec. ¶8, EEOC P/P App. 1363-1364.)

RESPONSE: Admitted.

272. CRST listed 172 complaints of sexual harassment on its Positive Work Environment Chart ("PWE Chart") for the period from December 14, 2004 to October 13, 2008. (CRST First Supplemental answers to EEOC First Interrogatories, 01-15-09, EEOC P/P App. 605-610; PWE Chart, EEOC P/P App. 1191-1195.)

RESPONSE: Admitted.

273. Of the 172 complaints identified above, 157 of them were received between January 1, 2005 and October 15, 2008, and were made by a female driver against a male driver. (PWE Chart, EEOC P/P App. 1191-1195.)

RESPONSE: Admitted.

***

278. CRST documents indicate that additional women were sexually harassed, although they were not included on the PWE Chart, and were not the subject of an investigation. *(See,* Doc. No. CRST 159782, EEOC P/P App. 1194; Doc. No. CRST 189964, EEOC P/P App. 1195.)

RESPONSE: Admitted.

***

280. Of the 154 women who have given testimony as a class member, the following is a partial list of some of the similar types of mistreatment reported.

a. Women exposed to male nudity:

1. Kristi Allen (K. Allen dep. at 62; CRST Omnibus App. p. 135)

2. Adda Brown-Lenzer (A. Brown-Lenzer dep. at 71-73, 82-83; EEOC P/P App. 137, 140)

3. Marie Foster (M. Foster dep. at 93-96; EEOC P/P App. 204)

4. [Deleted]

5. Debra Hindes (D. Hindes dep. at 35; CRST Omnibus App. p. 1349)

6. Lola Hutton (L. Hutton dep. at 66-67; EEOC P/P App. 405)

7. Diane Johnson (D. Johnson dep. at 57-59; CRST Omnibus App. p. 1560-1561)

8. Ginger Laudermilk (G. Laudermilk dep. at 39; CRST Omnibus App. p. 1616)

9. Madeline Lovins (M. Lovins dep. at 39; CRST Omnibus App. p. 1677)

10. Margaret McCain (M. McCain dep. at 35-36; CRST Omnibus App. p. 1755)

11. Darlene Miller (D. Miller dep. at 54-55; CRST Omnibus App. p. 1899)

12. Gloria South (G. South dep. at 63-74; EEOC P/P App. 508-511)

13. Robin Timmons (R. Timmons dep. at 63-64; CRST Omnibus App. p. 3148)

14. [Deleted]

15. Rhonda Wellman (R. Wellman dep. at 67-68; CRST Omnibus App. p. 3342)

16. Pamela Wright-Hoffman (P. Wright-Hoffman dep. at 79; CRST Omnibus App. p. 1375)

b. Men urinating in front of women:

1. Kristi Allen (K. Allen dep. at 37-38; CRST Omnibus App. p. 128-129)

2. Linda Austin (L. Austin dep. at 36-37; CRST Omnibus App. p. 147)

3. [Moved to c.18]

4. Kathy Cannoles (K. Cannoles dep. at 32, 51-52; CRST Omnibus App. p. 530, 535)

5. Denise Desonier (D. Desonier dep. at 52-53; CRST Omnibus App. p. 857)

6. Maybi Fernandez-Fabre (M. Fernandez-Fabre dep. at 41-43; 50-51; CRST Omnibus App. p. 977-978, 980)

7. Martha Griffin (M. Griffin dep. 88-89; CRST Omnibus App. p. 1298)

8. Debra Hindes (D. Hindes dep. 57; CRST Omnibus App. p. 1353)

9. Catherine Howard (C. Howard dep. at 52-53; CRST Omnibus App. p. 1425)

10. Julie Noernberg (J. Noernberg dep. at 55, 58; CRST Omnibus App. p. 1958-1959)

11. Priscilla Stephenson (P. Stephenson dep. at 53, 118; CRST Omnibus App. p. 3026, 3037)

12. Laurie Thompson (L. Thompson dep. at 32; CRST Omnibus App. p. 3127)

13. Robin Timmons (R. Timmons dep. at 60, 65; CRST Omnibus App. p. 3147-3148)

14. Rachel Tucker (R. Tucker dep. at 53-54; CRST Omnibus App. p. 3218-3219)

15. Rebecca Waisr (R. Waisr dep. at 74; CRST Omnibus App. p. 3285)

c. Men masturbating in its trucks:

1. Linda Austin (L. Austin dep. at 45-46; CRST Omnibus App. 149-150)

2. Antoinett Baldwin (A. Baldwin dep. at 35; CRST Omnibus App. p. 223)

3. Peggy Blake (P. Blake dep. at 49; CRST Omnibus App. p. 446)

4. Lillie Bingaman (L. Bingaman dep. at 42; CRST Omnibus App. p. 427)

5. Natasha Brown (N. Brown dep. at 53-54; CRST Omnibus App. p. 509-10)

6. Dorothy Dockery (D. Dockery dep. at 31; CRST Omnibus App. p. 899)

7. Marie Foster (M. Foster dep. at 109-115; EEOC P/P App. 205-206)

8. Katherine Heckman (K. Heckman dep. at 81-83; EEOC P/P App. 265-266)

9. Victoria High (V. High dep. at 31-32; EEOC P/P App. 271)

10. Tequila Jackson (T. Jackson dep. at 105-106; EEOC P/P App. 436)

11. Brenda Kennett (B. Kennett dep. at 7-8; CRST Omnibus App. p. 1591)

12. Darlene Miller (D. Miller dep. at 84-85; CRST Omnibus App. p. 1906)

13. Bonnie Moesch (B. Moesch dep. at 27-28; EEOC P/P App. 309; CRST Omnibus App. p. 1917)

14. Bobbi O'Dell (B. O'Dell dep. at 63-64; CRST Omnibus App. p. 1980)

15. Kathleen Peterson (K. Peterson dep. at 84-85; EEOC P/P App. 355)

16. Kathleen Seymour (K. Seymour dep. at 74-75; CRST Omnibus App. p. 2582)

17. Joyce Toppin (J. Toppin dep. at 77-79; EEOC P/P App. 521)

18. Belinda Bedford (B. Bedford dep. at 69-70; CRST Omnibus App. p.)

d. Men sexually assaulting women, including jumping on top of them, punching/kicking them, and grabbing/fondling them:

1. Gwen Allen (G. Allen dep. at 36-37; CRST Omnibus App. p. 92)

2. Linda Austin (L. Austin dep. at 50-71; CRST Omnibus App. 151-156)

3. Pamela Barlow (P. Barlow dep. at 31; CRST Omnibus App. p. 271)

4. Mary Bender (M. Bender dep. at 17-18, 22, 32, 34; CRST Omnibus App. p. 406-408, 410-411)

5. Lillie Bingaman (L. Bingaman dep. at 41-44; CRST Omnibus App. p. 426-27)

6. Bethany Broeker (B. Broeker dep. at 46, 64-65; CRST Omnibus App. p. 490, 494)

7. Kelly Carney (K. Carney dep. at 73; CRST Omnibus App. p. 642)

8. Patrice Cohen (P. Cohen dep. at 45-46; CRST Omnibus App. p. 705-706)

9. Denise Desonier (D. Desonier dep. at 51-52; CRST Omnibus App. p. 857)

10. Barbara Dixon (B. Dixon dep. at 26-27; EEOC P/P App. 178)

11. Nicole Edwards (N. Edwards dep. at 94, 99-100; CRST Omnibus App. p. 946, 947)

12. Robryna Fitch (R. Fitch dep. at 61, 85, 109-110, 171-172; CRST Omnibus App. p. 1033, 1039, 1045-1046, 1058)

13. Yvonne Fortner (Y. Fortner dep. at 40-44; EEOC P/P App. 196-197)

14. Marie Foster (M. Foster dep. at 109-115; EEOC P/P App. 205-206)

15. Leah Myers-Graham (L. Myers-Graham dep. at 66-69; CRST Omnibus App. 1167)

16. Martha Griffin (M. Griffin dep. at 86-87; 94, 98, 103, 134; CRST Omnibus App. p. 1298, 1300-1302, 1306)

17. Sherri Halley (S. Halley dep. at 27-31; EEOC P/P App. 244-245)

18. Carolyn Hunsucker (C. Hunsucker dep. at 48-50; EEOC P/P App. 414-415)

19. Lola Hutton (L. Hutton dep. at 71-74; EEOC P/P App. 406-407)

20. January Jackson (J. Jackson dep. at 45-46; CRST Omnibus App. p. 1519, 1520)

21. Tequila Jackson (T. Jackson dep. at 86-87; EEOC P/P App. 434)

22. Diona Johnson (D. Johnson dep. at 40-42, 50-51; EEOC P/P App. 441-443)

23. Tina Lott (T. Lott dep. at 68, 77-78, 94-95; EEOC P/P App. 279; CRST Omnibus App. p. 1663, 1665-66, 1670)

24. Karen McCall (K. McCall dep. at 59-62, 65; CRST Omnibus App. p. 1782-1783)

25. Vernona McIver (V. McIver dep. at 39-40, 42; CRST Omnibus App. p. 1865, 1866)

26. Cindy Moffett (C. Moffett dep. at 74-82, 108-112, 114-121; EEOC P/P App. 292-293, 297-300)

27. Patricia Merritt (P. Merritt dep. at 52; CRST Omnibus App. p. 1881)

28. Darlene Miller (D. Miller dep. at 66-69; CRST Omnibus App. p. 1902)

29. Valerie Montoya (V. Montoya dep. at 54-58, 68-70; EEOC P/P. App. 313-314, 316-317)

30. Julie Noernberg (J. Noernberg dep. at 71; CRST Omnibus App. p. 1962)

31. Sherry O'Donnell (S. O'Donnell dep. at 94-95; CRST Omnibus App. p. 1997)

32. Anya Owens (A. Owens dep. at 20, 25; CRST Omnibus App. p. 2033, 2034)

33. Tammi Pile (T. Pile dep. at 62; CRST Omnibus App. p. 2353)

34. Janet Ranney (J. Ranney dep. at 101, 105, 110-111; CRST Omnibus App. p. 2519, 2520, 2522)

35. Margaret Rice (M. Rice dep. at 138-143, 147-148; EEOC P/P App. 374-376)

36. Shalitha Ross (S. Ross dep. at 50-51, 63-64; EEOC P/P App. 384, 387)

37. Denise Roundtree (D. Roundtree dep. at 88; CRST Omnibus App. p. 2548)

38. Mechelle Schuder (M. Schuder dep. at 86-90; EEOC P/P App. 472-473)

39. Gloria South (G. South dep. at 47-49, 59-60, 64-66, 72-74, 78-79; EEOC P/P App. 505-512)

40. Christine Taylor (C. Taylor dep. at 38-39; CRST Omnibus App. p. 3068)

41. Joyce Toppin (J. Toppin dep. at 82-84; EEOC P/P App. 522)

42. Rachel Tucker (R. Tucker dep. at 51, 53-54; CRST Omnibus App. p. 3218-3219)

43. Tracy Tuttle (T. Tuttle dep. at 78-80, 82-86, 126; EEOC P/P App. 542-544, 548)

44. Rhonda Wellman (R. Wellman dep. at 50-52; CRST Omnibus App. p. 3338)

45. Tameisha Wilson (T. Wilson dep. 26-30; CRST Omnibus App. p. 3365-3366)

46. Diana Vance (D. Vance dep. at 51-52; CRST Omnibus App. p. 3234)

47. Ramona Villareal (R. Villareal dep. at 45-48, 50-52; EEOC P/P App. 557-558)

48. Kimberly Watson (K. Watson dep. at 35-37, 39-40; EEOC P/P App. 590-591)

49. Betsy Ybarra (B. Ybarra dep. at 29; CRST Omnibus App. p. 3395)

e. Men engaging in other offensive sex-based touching, including unwanted brushing against them, hugging, and patting:

1. Kierston Alleva (K. Alleva dep. at 30-31; EEOC P/P App. 7)

2. Tracey Ball (T. Ball dep. at 50-51; EEOC P/P App. 15)

3. Stacy Barager (S. Barager dep. at 79; CRST Omnibus App. p. 240)

4. Bonnie Batyik (B. Batyik dep. at 36, 40; CRST Omnibus App. p. 305-306)

5. Belinda Bedford (B. Bedford dep. at 49-51, 54, 72-74; CRST Omnibus App. p. 353-355, 359-360)

6. Mary Bender (M. Bender dep. at 22-49; CRST Omnibus App. p. 408-414)

7. Lillie Bingamen (L. Bingamen dep. at 37; CRST Omnibus App. p. 425)

8. Bethany Broeker (B. Broeker dep. at 42; CRST Omnibus App. p. 489)

9. Natasha Brown (N. Brown dep. at 66; CRST Omnibus App. p. 513)

10. Kelli Carney (K. Carney dep. at 66, 73-75; CRST Omnibus App. p. 622-624)

11. Diana Chester (D. Chester dep. at 106-107, 181-183; EEOC P/P App. 148, 157)

12. Kim Chisholm (K. Chisholm dep. at 56, 79-80; EEOC P/P App. 161, 163)

13. Patrice Cohen (P. Cohen dep. at 34-35; CRST Omnibus App. p. 703)

14. Linda Conner (L. Conner dep. at 38-39; CRST Omnibus App. p. 747)

15. Catherine Coronado (C. Coronado dep. at 28-29; CRST Omnibus App. p. 763)

16. Margaret Daniels (M. Daniels dep. at 76; CRST Omnibus App. p. 811)

17. Tamara Demery (T. Demery dep. at 46-47; CRST Omnibus App. p. 846)

18. Denise Desonier (D. Desonier dep. at 56, 90; EEOC P/P App. 176; CRST Omnibus App. p. 858, 867)

19. Dorothy Dockery (D. Dockery dep. at 28-29, 62; CRST Omnibus App. p. 898, 906)

20. Robryna Fitch (R. Fitch dep. at 83-85, 172; CRST Omnibus App. p. 1039, 1058)

21. Cynthia Fisk (C. Fisk dep. at 49-50, 62-63; CRST Omnibus App. p. 1015, 1020)

22. Angelene Gatewood (A. Gatewood dep. at 54-55; CRST Omnibus App. p. 1143)

23. Martha Griffin (M. Griffin dep. at 89; CRST Omnibus App. p. 1298)

24. Sylvia Griffith (S. Griffith dep. at 39-40; CRST Omnibus App. p. 1317)

25. Wanda Hasbell (W. Hasbell dep. at 68-69; EEOC P/P App. 257-258)

26. Victoria High (V. High dep. at 31-32; EEOC P/P App. 271)

27. Pamela Hoffman (P. Hoffman dep. at 75; CRST Omnibus App. p. 1374)

28. Lola Hutton (L. Hutton dep. at 58-59; EEOC P/P App. 403)

29. Carolyn Hunsucker (C. Hunsucker dep. at 44, 48-50; EEOC P/P App. 413-415)

30. Zainabu Jenga (Z. Jenga dep. at 48-51; CRST Omnibus App. p. 1533-1534)

31. Brenda Kennett (B. Kennett dep. at 7-8, 11-12; CRST Omnibus App. p. 1591-1592)

32. Tina Lott (T. Lott dep. at 67-68; CRST Omnibus App. p. 1663)

33. Margaret McCain (M. McCain dep. at 47, 52-55; CRST Omnibus App. p. 1758-1759)

34. Tessa Medley Duncan (T. Medley-Duncan dep. at 40-43, 50; EEOC P/P App. 184-185, 187)

35. Bonnie Moesch (B. Moesch dep. at 50; CRST Omnibus App. p. 1923)

36. Julie Norenberg (J. Norenberg dep. at 72; CRST Omnibus App. p. 1962)

37. Rachel Perhealth (R. Perhealth dep. at 89-91; CRST Omnibus App. p. 2228-2229)

38. Carol Pettit (C. Pettit dep. at 109; CRST Omnibus App. p. 2252)

39. Tammi Pile (T. Pile dep. at 45-47; CRST Omnibus App. p. 2348, 2349)

40. Danette Quintanilla (D. Quintanilla dep. at 29-33, 36-37, 41; CRST Omnibus App. p. 2481-2484)

41. Janet Ranney (J. Ranney dep. at 96; CRST Omnibus App. p. 2518)

42. Margaret Rice (M. Rice dep. at 94-103, 105; EEOC P/P App. 366-369)

43. Shalitha Ross (S. Ross dep. at 47-50; EEOC P/P App. 383-384)

44. Denise Roundtree (D. Roundtree dep. at 88; CRST Omnibus App. p. 2548)

45. Mechelle Schuder (M. Schuder dep. at 84; EEOC P/P App. 471)

46. Jammie Scott (J. Scott dep. at 20, 32, 38, 62; CRST Omnibus App. p. 2560, 2563-2564, 2568)

47. Mary Smith (M. Smith dep. at 57; CRST Omnibus App. p. 2911)

48. Jennifer Susson (J. Susson dep. at 47; CRST Omnibus App. p. 3050)

49. Laurie Thompson (L. Thompson dep. at 36-37; CRST Omnibus App. p. 3128)

50. Joyce Toppin (J. Toppin dep. at 56, 77-79; EEOC P/P App. 519, 521)

51. Rachel Tucker (R. Tucker dep. at 50; CRST Omnibus App. p. 3218)

52. Ramona Villareal (R. Villareal dep. at 47-48; 55-56, 59-61, 64-67; EEOC P/P App. 557, 559, 560)

53. Barbara Wallace (B. Wallace dep. at 47-48, 55-56, 59-61, 64-67; EEOC P/P. App. 581, 583, 584-586)

54. Tiani Warden-Thompson (T. Warden-Thompson dep. at 66; CRST Omnibus App. 3320)

f. Men propositioning women for sex:

1. Kierston Alleva (K. Alleva dep. at 30-31; EEOC P/P App. 7)

2. Gwen Allen (G. Allen dep. at 38; CRST Omnibus App. p. 93)

3. Kristi Allen (K. Allen dep. at 55; CRST Omnibus App. p. 133)

4. Linda Austin (L. Austin dep. at 48-50; CRST Omnibus App. p. 150-151)

5. Antoinett Baldwin (A. Baldwin dep. at 26-28; CRST Omnibus App. p. 221)

6. Tracy Ball (T. Ball dep. at 48-49, 52-53; EEOC P/P App. 14-15)

7. Stacy Barager (S. Barager dep. at 78-79; CRST Omnibus App. p. 240)

8. Mary Beaton (M. Beaton dep. at 31, 37-40, 70; CRST Omnibus App. p. 323-325, 332)

9. Christine Bell Boyer (C. Bell-Boyer dep. at 76-77; 79-80; CRST Omnibus App. p. 397-398)

10. Mary Bender (M. Bender dep. at 34; CRST Omnibus App. p. 411)

11. Lillie Bingaman (L. Bingaman dep. at 35, 38; CRST Omnibus App. p. 425-426)

12. Peggy Blake (P. Blake dep. at 49, 73; CRST Omnibus App. p. 446, 451)

13. Amber Blauvelt (A. Blauvelt dep. at 36-37; EEOC P/P App. 102-103)

14. Natasha Brown (N. Brown dep. at 36; CRST Omnibus App. p. 506)

15. Kelly Carney (K. Carney dep. at 55; CRST Omnibus App. p. 619)

16. Diana Chester (D. Chester dep. at 99-101, 163-167, 186; EEOC P/P App. 146, 155-156, 158)

17. [Delete]

18. Darlearner Deese (D. Deese dep. at 41-42, 45; CRST Omnibus App. p. 825-826)

19. Nicole Edwards (N. Edwards dep. at 81; CRST Omnibus App. p. 942)

20. Cynthia Fisk (C. Fisk dep. at 47, 64; CRST Omnibus App. p. 1015, 1020)

21. Robryna Fitch (R. Fitch dep. at 86-87, 97; CRST Omnibus App. p. 1040-1042)

22. Catherine Fletcher (C. Fletcher dep. at 25, 41-42; CRST Omnibus App. p. 1118, 1122-1123)

23. Yvonne Fortner (Y. Fortner dep. at 39-44; EEOC P/P App. 196-197)

24. Marie Foster (M. Foster dep. at 139-140, 160-164; EEOC P/P App. 210, 214-215)

25. R. Fowler Allen (R. Fowler-Allen dep. at 42-43, 47-49, 53, 63-65; CRST Omnibus App. p. 109-111, 113)

26. Angelene Gatewood (A. Gatewood dep. at 46, 72-73, 84; CRST Omnibus App. p. 1141, 1146, 1149)

27. Leah Myers Graham (L. Myers Graham dep. at 78-81; CRST Omnibus App. p. 1170)

28. Zelestine Grant (Z. Grant dep. at 54-56; CRST Omnibus App. p. 1272)

29. Martha Griffin (M. Griffin dep. at 88, 102-103, 105; CRST Omnibus App. p. 1298, 1302)

30. Sylvia Griffith (S. Griffith dep. at 38-39; CRST Omnibus App. p. 1317)

31. Wanda Hasbell (W. Hasbell dep. at 58-59, 73-78; EEOC P/P App. 255-256, 259-260)

32. Victoria High (V. High dep. at 28-34; EEOC P/P App. 270-272)

33. Debra Hindes (D. Hindes dep. at 77, 84-85; CRST Omnibus App. p. 1358-1359)

34. Pamela Hoffman (P. Hoffman dep. at 76; CRST Omnibus App. p. 1374)

35. Tracey Hughes (T. Hughes dep. at 94, 97, 100, 112; CRST Omnibus App. p. 1505-1506, 1508)

36. Sheila Jackson (S. Jackson dep. at 89-92; EEOC P/P App. 421)

37. Tequila Jackson (T. Jackson dep. at 26-29, 74-78, 81-84, 105-106; EEOC P/P App. 429-433)

38. Zainabu Jenga (Z. Jenga dep. at 55-56; CRST Omnibus App. p. 1535)

39. Diane Johnson (D. Johnson dep. at 60-61; CRST Omnibus App. p. 1561)

40. Brenda Kennett (B. Kennett dep. at 11-12, 24; CRST Omnibus App. p. 1592, 1595)

41. Tina Lott (T. Lott dep. at 66-67; EEOC P/P App. 279)

42. Patricia Warr-Marzett (P. Warr-Marzett dep. at 79-80; CRST Omnibus App. p. 1698)

43. Rosalyn McDaniels (R. McDaniels dep. at 68, 70, 76; CRST Omnibus App. p. 1849-1851)

44. Darlene Miller (D. Miller dep. at 57-58, 61-62; CRST Omnibus App. p. 1899-1901)

45. Bonnie Moesch (B. Moesch dep. at 50, 53-54, 57-58; CRST Omnibus App. p. 1923-1925)

46. Cindy Moffett (C. Moffett dep. at 58-59, 86-87; EEOC P/P App. 290, 295)

47. Valerie Montoya (V. Montoya dep. at 54-58, 61-62; EEOC P/P App. 313-315)

48. Debra Moorer (D. Moorer dep. at 32; CRST Omnibus App. p. 1951)

49. Sherry O'Donnell (S. O'Donnell dep. at 77; CRST Omnibus App. p. 1993)

50. Shirley Parker (S. Parker dep. at 60, 76-77; CRST Omnibus App. p. 2055, 2059)

51. Christina Payne (C. Payne dep. at 34-35; CRST Omnibus App. p. 2068)

52. Kathleen Peterson (K. Peterson dep. at 34-35; EEOC P/P App. 349)

53. Carol Pettit (C. Pettit dep. at 105-107, 109; CRST Omnibus App. p. 2251-2252)

54. Donna Quigley (D. Quigley dep. at 65-66; CRST Omnibus App. p. 2246-2247)

55. Denise Roundtree (D. Roundtree dep. at 86-87; CRST Omnibus App. p. 2548)

56. Mechelle Schuder (M. Schuder dep. at 39-40, 43-44; EEOC P/P App. 469-470)

57. Jammie Scott (J. Scott dep. at 32-33, 39-40; CRST Omnibus App. p. 2563-2564)

58. Kathleen Seymour (K. Seymour dep. at 69, 80-81; CRST Omnibus App. p. 2580, 2583)

59. Jonne Shepler (J. Shepler dep. at 88-93; CRST Omnibus App. p. 2636-2637)

60. Annette Smith (A. Smith dep. at 57, 60; CRST Omnibus App. p. 2886-2887)

61. Mary Smith (M. Smith dep. at 40, 42, 43-44; CRST Omnibus App. p. 2907-2908)

62. Priscilla Stephenson (P. Stephenson dep. at 30, 47, 49, 64, 66-67; CRST Omnibus App. p. 3021, 3025, 3029-3030)

63. Jennifer Susson (J. Susson dep. at 18-19; CRST Omnibus App. p. 3043)

64. Joyce Toppin (J. Toppin dep. at 57-58, 80; EEOC P/P App. 520-521)

65. Tracy Tuttle (T. Tuttle dep. at 87-88, 126-127; EEOC P/P App. 544, 548)

66. Diana Vance (D. Vance dep. at 50-52, 60-61; CRST Omnibus App. p. 3234, 3236)

67. Ramona Villareal (R. Villareal dep. at 39-41; EEOC P/P App. 555-556)

68. Rebecca Waisr (R. Waisr dep. at 19, 23-24, 27-28, 47; CRST Omnibus App. p. 3274-3276, 3279)

69. Barbara Wallace (B. Wallace dep. at 64-67; EEOC P/P App. 585-586)

70. Tiani Warden-Thompson (T. Warden-Thompson dep. at 32, 34, 52, 54-56, 57, 61-64, 67; CRST Omnibus App. p. 3312-3313, 3316-3320)

71. Kimberly Watson (K. Watson dep. at 35-37, 46-47; EEOC P/P App. 590-591; 593)

72. Rhonda Wellman (R. Wellman dep. at 80-81, 84-85; CRST Omnibus App. p. 3345, 3346)

73. Sheila Wyrick (S. Wyrick dep. at 21, 24, 63-64; CRST Omnibus App. p. 3376-3377, 3386)

74. Betsy Ybarra (B. Ybarra dep. at 29; CRST Omnibus App. p. 3395)

g. Men throwing women off the truck or being threatened with it:

1. Antoinett Baldwin (A. Baldwin dep. at 36-37; CRST Omnibus App. p. 223)

Appendix P

2. Belinda Bedford (B. Bedford dep. at 59-60; CRST Omnibus App. p. 356)

3. Mary Bender (M. Bender dep. at 36; CRST Omnibus App. p. 411)

4. Lillie Bingaman (L. Bingaman dep. at 52; CRST Omnibus App. p. 429)

5. Amber Blauvelt (A. Blauvelt dep. at 103; EEOC P/P App. 103)

6. Natasha Brown (N. Brown dep. at 49; CRST Omnibus App. p. 508)

7. Kelli Carney (K. Carney dep. at 56-59; CRST Omnibus App. p. 619-620)

8. Margaret Daniels (M. Daniels dep. at 56-57; CRST Omnibus App. p. 806)

9. Darlearner Deese (D. Deese dep. at 42-43; CRST Omnibus App. p. 826)

10. Robryna Fitch (R. Fitch dep. at 61-62; CRST Omnibus App. P. 1033-34)

11. Yvonne Fortner (Y. Fortner dep. at 52-53; EEOC P/P App. 199-200)

12. Angelene Gatewood (A. Gatewood dep. at 45, 74, 82; CRST Omnibus App. p. 1140, 1147, 1149)

Appendix P

13. [Delete]

14. Victoria High (V. High dep. at 28-31; EEOC P/P App. 270-271)

15. Debra Hindes (D. Hindes dep. at 59-60; CRST Omnibus App. p. 1354)

16. Victoria Holmes (V. Holmes dep. at 92; EEOC Omnibus App. p. 327)

17. January Jackson (J. Jackson dep. at 86-88; EEOC P/P App. 418)

18. Ginger Laudermilk (G. Laudermilk dep. at 45; CRST Omnibus App. p. 1617)

19. Margaret McCain (M. McCain dep. 76-77; CRST Omnibus App. p. 1765)

20. Cindy Moffett (C. Moffett dep. at 124-125; EEOC P/P App. 301)

21. Julie Noernberg (J. Noernberg dep. at 80-81; CRST Omnibus App. p. 1964)

22. Ramona Villareal (R. Villareal dep. at 82; EEOC P/P App. 563)

23. Barbara Wallace (B. Wallace dep. at 64-67; EEOC P/P App. 585-586)

24. Patricia Warr-Marzett (P. Warr-Marzett dep. at 88; CRST Omnibus App. p. 1700)

25. Rhonda Wellman (R. Wellman dep. at 83, 86; CRST Omnibus App. p. 3346-3347)

h. Men making them uncomfortable by parking the truck or leaving them in isolated or bad places:

1. Kathy Cannoles (K. Cannoles dep. at 26-27; CRST Omnibus App. p. 529)

2. Patrice Cohen (P. Cohen dep. at 44-45; CRST Omnibus App. p. 705)

3. Dorothy Dockery (D. Dockery dep. at 54-57; CRST Omnibus App. p. 904)

4. Robryna Fitch (R. Fitch dep. at 58; CRST Omnibus App. p. 1033)

5. Zelestine Grant (Z. Grant dep. at 57-58; 66-67; CRST Omnibus App. p. 1272-1273, 1275)

6. Debra Hindes (D. Hindes dep. at 34-35; CRST Omnibus App. p. 1349)

7. Sheila Jackson (S. Jackson dep. at 92-94, 101; EEOC P/P App. 421-422; 424)

8. Leah Myers-Graham (L. Myers-Graham dep. at 82-87; CRST Omnibus App. p. 1171-1172)

9. Lucinda McBlair (L. McBlair dep. at 66-67, 69; CRST Omnibus App. p. 1739)

10. Julie Noernberg (J. Noernberg dep. at 70-79; EEOC Omnibus App. p. 532-537)

11. Sherry O'Donnell (S. O'Donnell dep. at 93, 151-154; CRST Omnibus App. p. 1996, 2010-2011)

12. Margaret Rice (M. Rice dep. at p. 94-103; EEOC P/P App. 366-368)

13. Mechelle Schuder (M. Schuder dep. at 86-90; EEOC P/P App. 472-473)

14. Patricia Marzett (P. Marzett dep. at 79-81; EEOC P/P App. 407)

i. Men who exposed them to pornography:

1. Stacy Barager (S. Barager dep. at 78, 86-87; CRST Omnibus App. p. 240, 242)

2. Natasha Brown (N. Brown dep. at 40, 41, 53; CRST Omnibus App. p. 507, 509)

3. Diana Chester (D. Chester dep. at 53, 99-101; EEOC P/P App. 144, 146-147)

4. Tamara Demery (T. Demery dep. at 37; CRST Omnibus App. p. 843)

5. Yvonne Fortner (Y. Fortner dep. at 40-44; EEOC P/P App. 196-197)

6. Leah Myers Graham (L. Myers Graham dep. at 63, 65-66; CRST Omnibus App. p. 1166-1167)

7. Sylvia Griffith (S. Griffith dep. at 50-51; CRST Omnibus App. p. 1320)

8. Victoria High (V. High dep. 32-34; EEOC P/P App. 271-272)

9. Rosalyn McDaniels (R. McDaniels dep. at 64-65; EEOC P/P App. 287)

10. Debra Moorer (D. Moorer dep. at 52-53; CRST Omnibus App. p. 1952)

11. Tammi Pile (T. Pile dep. at 48-49; CRST Omnibus App. p. 2349)

12. Kathleen Seymour (K. Seymour dep. at 74-76, 78-80; CRST Omnibus App. p. 2582-2583)

13. Jonne Shepler (J. Shepler dep. at 77-78, 93-94; CRST Omnibus App. p. 2633-2634, 2637-2638)

14. Trayce Traylor (T. Traylor dep. at 42-43; EEOC P/P App. 530)

15. Ramona Villareal (R. Villareal dep. at 52-53; EEOC P/P App. 558-559)

16. Rebecca Waisr (R. Waisr dep. at 88-90; CRST Omnibus App. p. 3287-3288)

17. Kimberly Watson (K. Watson dep. 41-42; EEOC P/P App. 592):

RESPONSE: EEOC's statements that the following class members reported similar types of mistreatment are not supported by the materials cited by EEOC in their respective subparagraphs of paragraph 280 and therefore must be disregarded for the following reasons:

a. Women exposed to male nudity:

1. Kristi Allen: Allen stated that McCauley's private areas were covered with a blanket and though "[she] could see that he didn't have any clothes on, [she] didn't actually see anything." Allen Dep. 62, CRST App. 0135.

3. Marie Foster: Castell told Foster he sleeps naked. Foster Dep. 93-96, EEOC P/P App. 204.

6. Lola Hutton: Brady had his shirt off. Hutton Dep. 66-67, EEOC P/P App. 405.

7. Diane Johnson: On two occasions, Johnson saw Tyrell with just his underwear on. Johnson Dep. 57, CRST App. 1560.

9. Madeline Lovins: After the first week, Smith drove with his shirt off. Lovins Dep. 39, CRST App. 1677.

10. Margaret McCain: Ward told her he slept in the nude and not to open the curtains, but there is no indication that she was exposed to him naked. McCain Dep. 36-37, CRST App. 1755.

b. Men urinating in front of women:

5. Denise Desonier: Desonier did not testify that he urinated in front of her. *See* Desonier Dep. 52-53, CRST App. 0857.

6. Maybi Fernandez Fabre: Fernandez Fabre described how she herself urinated on the truck, but there is no indication that she was exposed to Mortenson urinating. Fernandez Fabre Dep. 41-43, 50-51, CRST App. 0977-0978, 0980.

7. Martha Griffin: Griffin did not testify that he urinated in front of her. *See* Griffin Dep. 80-89, CRST App. 1298.

14. Rachel Tucker. Tucker did not testify that James urinated in front of her. *See* Tucker Dep. 53-54, CRST App. 3218-3219.

15. Rebecca Waisr: Waisr did not testify that a male urinated in front of her. Waisr Dep. 74, CRST App. 3285.

c. Men masturbating in trucks:

9. Victoria High: High did not want to sit on his bunk because "every time he'd get himself off he'd put it in a sock and keep it in the corner of the bed." High Dep. 31, EEOC P/P App. 271.

d. Men sexually assaulting women, including jumping on top of them, punching/kicking them, and grabbing/fondling them:

9. Denise Desonier: Desonier stated that Tim Redecker, her second trainer, smacked her in the head, which she stated was "inappropriate." Desonier Dep. 51-52, CRST App. 0857. Further, Desonier did not claim that Redecker sexually harassed her; her only accused harasser was Brian Mallory. Desonier Dep. 51, CRST App. 0857.

10. Barbara Dixon: Dixon woke up naked and looked for her clothes. Dixon Dep. 26-27, EEOC P/P App. 178.

21. Tequila Jackson: Jackson did not testify that any physical touching occurred. Jackson Dep. 87, EEOC P/P App. 434.

28. Darlene Miller: The pages cited do not support the statement that Miller was sexually assaulted. Miller stated that she and Mowerson started arguing and he became bossy. Miller Dep. 66, CRST App. 1902. They began fighting on the truck. *Id.* Miller hit Mowerson, but he never hit her back. *Id.*

33. Tammy Pile: When Pile was asked if she claimed that there was any sex-based harassment of Pile by Lovendahl during the 18 days they were on the truck together, Pile said "no." Pile Dep. 62, CRST App. 2353.

34. Janet Ranney: Ranney testified that "there was no physical disgusting things that happened with him." Ranney Dep. 110, CRST App. 2522.

39. Gloria South: Garant threw a box of condoms into her lap. South Dep. 59-60, EEOC P/P App. 507. Garant hit the gas pedal and South hit her head on the sleeper wall. *Id.* at 78-79, EEOC P/P App. 512.

e. Men engaging in other offensive sex-based touching, including unwanted brushing against them, hugging, and patting:

4. Bonnie Batyik: Buckner "went to swing and hit [her]." Batyik Dep. 36, CRST App. 0305. Batyick said that "[i]nstead of hitting [her], he hit the door or window." *Id.* Batyik does not testify that there was physical touching.

15. Catherine Coronado: Coronado stated that Bosworth made comments about how big his penis was and removed his false teeth and made movements of his tongue simulating oral sex. Coronodo Dep. 28-29, CRST App. 0763. Coronado does not testify that there was physical touching.

24. Sylvia Griffith: Griffith stated that "[w]hen [she] was sleeping, [she could] feel [Mejri] staring at [her]." Griffith Dep. 39, CRST App. 1143. Griffith testified that Mejri did not engage in any other behavior that Griffith felt was sexual or inappropriate. *Id.* at 40, CRST App. 1143.

25. Wanda Hasbell: Hasbell did not indicate any touching. "Only one time did he reach over and try to put his hands on me and I said, don't ever touch." Hasbell Dep. 68, EEOC P/P App. 257.

52. Ramona Villereal: DeJong asked Villereal to give other drivers a peep show. Villereal does not testify to any touching. Villeareal Dep. 64-67, CRST Supp. App. 3492-3493.

54. Tiani Warden-Thompson: Warden-Thompson did not mention that Evans ever touched her. *See* Warden-Thompson Dep. 66, CRST App. 3320.

f. Men propositioning women for sex:

7. Stacy Barager: Barager stated that Williamson told her that she could flash him if she felt like it. Barager Dep. 78, CRST App. 0240. Barager testified that Williamson said that "if he wanted a piece of ass, basically, that he would take it." *Id.* at 78-79, CRST App. 0240.

12. Peggy Blake: Blake testified that, while she was lying on the top bunk and Lombard was on the

bottom bunk, Lombard told her, "[i]t's hard," "[he's] going to have to have some relief," and "he done whatever these men do and relieved hisself [sic]." Blake Dep. 49, CRST App. 0446. Blake said that Lombard "relieved himself" by "jacking hisself [sic] off." *Id.* Blake states only that Lombard told her that she could drive the truck hard, because he wanted her to tear it up so that he could get a new truck. *Id.* at 73, CRST App. 0451.

14. Natasha Brown: While "J" was drinking, he made conversation that "if a female gets on his truck, they're entitled to give him some sexual contacts." Brown Dep. 36, CRST App. 0506.

20. Cynthia Fisk: Fisk stated that when they stopped at a truck stop when something broke on the truck and they needed tires, that Booze "said something about ... just acting like, you know, that [they] were married." Fisk Dep. 47, CRST App. 1015. Fisk also stated that Booze said, "[he could] get rid of [his] girlfriend and [she] could be [his] girlfriend." *Id.* at 64, CRST App. 1020.

27. Leah Myers Graham: Graham testified that one of her lead drivers, "Creeper," "started talking about having sex with other people" and that "he would tell [her], you know, he's the best lover and he's, you know, had lots of women." Graham Dep. 80, CRST 1170. Graham informed him that "[she was] not the woman that [he was] going to have sex with." *Id.* at 81, CRST App. 1170.

36. Sheila Jackson: Derrick said "whatever goes on in this truck stays on this truck, nobody is going to know what goes on in this truck" and showed her pictures of older women. Jackson Dep. 89-90, EEOC P/P App. 421.

37. Tequila Jackson: EEOC references Jackson Dep. 77-78, EEOC P/P App. 432, which includes no proposition-like conduct, and Jackson Dep. 81-84, EEOC P/P App. 433, which describes the conduct of Smith's female friend towards Jackson.

38. Zainabu Jenga: Jenga testified that Grimes told her that he had a "king size bed and [she could] come spend the night [there]." Jenga Dep. 56, CRST App. 1535. Grimes told her "don't worry, [he would not] touch [her] or anything." *Id.*

39. Diane Johnson: Tyrell Johnson offered to get a room at a hotel for the two of them to share. Johnson Dep. 60, CRST App. 1561. She testified that she told Tyrell that she did not know whether the hotel would have separate beds, but either way, she was not going to stay in a hotel room with him. *Id.* at 61, CRST App. 1561.

46. Cindy Moffett: Hines asked her to lay with him and talk to him until he fell asleep. Moffett Dep. 58-59, EEOC P/P App. 290. He later said that her evaluation was not turned in yet and that he might tell Brian that she needed more city driving, which would cause her to spend more

time in the truck with him. *Id.* at 86-87, EEOC P/P App. 295.

49. Sherry O'Donnell: O'Donnell testified that Spears "told [her] that he was looking for a girlfriend to be a co-driver," and she testified that she did not initially rule out becoming his girlfriend if they became co-drivers. O'Donnell Dep. 77, CRST App. 1993.

50. Shirley Parker: Parker stated that, during her time with Caudle, he would make comments about her looks, and comments "about [her] and him," and "[she] took it as to having sex." Parker Dep. 60, CRST App. 2055. Parker also stated that, while she was driving, Caudle went into the back, partially undressed, and came back to sit in the passenger's seat. *Id.* at 76, CRST App. 2059. While sitting in the passenger seat, Caudle said things of a sexual nature. *Id.* Parker does not remember how much of what Caudle said was sexual, and she did not describe his sexual comments. *Id.*

71. Kimberly Watson: Crockett said he had not had a girlfriend in a long time, asked what girls are like these days, and made comments trying to get her to break up with her fiancé and "go out with him," saying they could drive together. Watson Dep. 35-37, EEOC P/P App. 590-591. She said she was not interested. *Id.* at 35-36, EEOC P/P App. 590.

g. Men throwing women off the truck or being threatened with it:

9. Darleaner Deese: Deese testified that Gorham "threatened to throw her *stuff* out the window." Deese Dep. 43, CRST App. 0826 (emphasis added). Deese was driving at the time. *Id.* She stated that she would get off the truck at the next truck stop. *Id.* When she got to the truck stop, Gorham took one of her bags and threw it. *Id.*

11. Yvonne Fortner: Fortner said he could not take it anymore and she was dropped off, and he threw her bags. Fortner Dep. 52-53, EEOC P/P App. 199-200.

16. Victoria Holmes: Holmes states regarding Jeremy: "No he, didn't threaten to put me off. He relayed that this was something that could be done, it had been done .... No, I didn't take it to mean he would. I took it to mean that he could if he wanted to." Holmes Dep. 92, EEOC P/P App. 398.

17. January Jackson: Jackson stated that she had heard him mention one time how he had put somebody off the truck and she had that in the back of her mind. Jackson Dep. 87, EEOC P/P App. 419.

22. Ramona Villareal: Villareal feared he would dump her because she had seen it happen to

other women while she was driving with CRST. Villareal Dep. 84, EEOC P/P App. 563.

h. Men making them uncomfortable by parking the truck or leaving them in isolated or bad places:

1. Kathy Cannoles: The material cited by EEOC does not support the statement that she was made uncomfortable by Walker parking the truck or leaving her in isolated or bad places. On the contrary, Cannoles states that the only time they stopped was to get fuel or drop a load. Cannoles Dep. 26, CRST App. 0529.

3. Dorothy Dockery: The material cited by EEOC does not support the statement that she was made uncomfortable by Byerley parking the truck or leaving her in isolated or bad places. Dockery Dep. 54-57, CRST App. 0904.

5. Zelestine Grant: The material cited by EEOC does not support the statement that she was made uncomfortable by Ford parking the truck or leaving her in isolated or bad places. Grant Dep. 57-58, 66-67, CRST App. 1272-1273, 1275.

4. Robryna Fitch: Fitch stated that she and Enrique got into a fight their first night because the bathroom in their motel room flooded, and Enrique opened the door to the motel (to let the smell out) and would not let her close the door that night. Fitch Dep. 57-58, CRST App. 1032-1033.

6. Debra Hindes: The material cited by EEOC does not support the statement that she was made uncomfortable by Timmerman parking the truck or leaving her in isolated or bad places. Hindes Dep. 34-35, CRST App. 1349.

9. Lucinda McBlair: The cited pages do not support the statement that Martinez made her uncomfortable by parking the truck or leaving her in an isolated or bad place. McBlair Dep. 66-67, 69, CRST App. 1739.

CRST admits the remainder of paragraph 280.

* * * *

APPENDIX Q — EXCERPT OF TRANSCRIPT OF 30(B)(6) DEPOSITION OF EEOC, TAKEN JANUARY 26, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

The videotaped 30(b)(6) deposition of EQUAL EMPLOYMENT OPPORTUNITY COMMISSION by JOHN HENDRICKSON, called for examination, taken before NICOLE SCOLA, CSR No. 084-004524, a Notary Public within and for the County of DuPage, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 4000, 330 North Wabash Avenue, Chicago, Illinois, on the 26th day of January, A.D. 2009, at 9:34 a.m.

* * *

Appendix Q

[34]whatever its reasons were, was segregating training. They would not let women be trained by men. That is violation of Title VII.

Q. Period?

A. Period.

Q. All right. Even if — even if the reason is to eliminate or prevent incidents of sexual harassment?

A. How about if I said to you or you said to me, we have to have — Swift was entitled to have — not have black drivers trained by whites or vice versa even if the reason was to prevent racial harassment? Would I think that was appropriate? No, of course not.

Q. I'm not asking what you think, Mr. Hendrickson. I'm asking —

A. The EEOC, what I'm telling you, our practice would not be to give anybody a pass on any kind of discrimination because they said we have to do this because if we don't —

Q. I'm —

A. — then some — white drivers will be calling black drivers "niggers." You know, male drivers will be calling female drivers "whores." [35]The only way we can deal with that is segregation. That is exactly the opposite of the entire trend of what we did in 1964, the era of civil rights. I'm amazed that you can pose that question.

Appendix Q

Q. So EEOC would bring suit for punitive damages against any trucking company which had a same sex training policy in order to prevent the incidents of sexual harassment? Is that basically right, Mr. Hendrickson?

I think I hear you and I think I understand you.

A. The —

Q. That's all I want our jury to understand, is that.

A. It's —

Q. Exactly that.

A. First of all — first of all, in order to bring suit, we would have to have a charge of discrimination from one of the victims or a commissioner's charge. Then we would have to conduct an investigation to determine was there reasonable cause to believe, in fact, the training was segregated on the basis of sex, race, religion, national origin, disability status, whatever it [36]might be.

If there was an administrative determination to that effect and the company — we were unable to bring the company and the charging parties together into a voluntary conciliation, then we look at the case and said, is this a case which should be litigated?

And in making that assessment, then we'd say, do we have enough attorneys? Do we have enough — do we have enough money for depositions? Do we — is the case in a

jurisdiction where we think we can do some good? A whole plethora of reasons which we would consider whether to bring suit.

But if you're asking does EEOC sue every single trucking company in the country that has done sex segregated training, I would guess that the answer is no, we would not attempt to do that any more than we would attempt to sue every single employer who engages in any other practice.

Q. Sir, isn't it true that at the time that the EEOC brought its suit against Swift back in the '90s, that Swift defended itself by saying, essentially, that the reason it had same sex [37]training policies is to prevent incidents of sexual harassment; isn't that true?

A. That is one of the — that is one of the things that I gleaned from the pleadings which I reviewed.

Q. And the EEOC categorically rejected that, correct?

A. What do you mean categorically rejected that? Just so —

Q. You sued them anyway and sought punitive damages, correct?

A. We certain — we would never withhold a lawsuit because the employer said, we're doing this segregation but really, you know, EEOC, you should understand the segregation is good for the victims. I mean, if we did that,

you know, every person in the country would be on our case.

You can't make a decision that you're not going to file a lawsuit against somebody who's blatantly discriminating because they say, oh, it's good for the victims that we discriminate. That's nonsense.

Q. So the EEOC also brought suit against Gordon Trucking Company, didn't it?

[38]A. Yeah. It looks like it was the same kind of lawsuit.

Q. Another long-haul trucking company?

A. Yes.

Q. Swift is a long-haul trucking company that had men and women driving together?

A. It appears to be that from the documents that I reviewed.

Q. And Gordon is a long-haul trucking company —

A. Yes.

Q. — that had men and women —

A. Yes.

Appendix Q

Q. And both Swift and Gordon defended themselves in those lawsuits by saying, essentially, that the reason, the bona fide reason they gave for having same sex training policies was to eliminate or prevent incidents of sexual harassment, correct?

A. Well, I was not in this — these cases were litigated by the Seattle district office of the EEOC, which has never been part of my jurisdiction, and I was not involved in the discovery in those cases.

So I cannot say all of the — I'm sure — [39]I doubt that that's — I feel certain as a litigator that they had a lot of different things at their defense that they said.

I gather from the documents that I've reviewed that the reason — that in terms of this kind of rule, things that they probably threw into the mix of their defense were the — as you say, the issue of sexual harassment.

It appears — I gather from the documents, also the issue of religion. And also I gather the issue of marital fidelity were probably all concerns that I — as I look at these documents and try to interpret what was 10 — 10 or 15 years ago that were these companies raising as their defense.

I'm guessing all of those figured. And I would bet if we went back and looked — and got the depositions of their personnel administrators, probably all of these things would appear as being offered as defenses for this — for this rule.

Appendix Q

Q. Including the intention — or at least the intention that they — that these companies articulated of attempting to prevent incidents of sexual harassment, correct?

[40]A. I'm not sure — I wouldn't go so far as to say that I read from any of these documents that they ever had the intention to eliminate sexual harassment. They — I think they had — they — they — as so many companies do, they had a policy which stated, oh, we're against sexual harassment, but every — I can't recall in my years of experience where — where we — where in really sexual harassment cases where there's been really vicious sexual harassment where the company hasn't said, we have a policy against sexual harassment. They say that all the time.

Roadway says it in this case. We have a policy against sexual harassment. But to this day, Roadway's chief executive says, sure, I get complaints all the time. I get complaints. I get three complaints a month about sexual harassment. We've got a policy.

So, sure, they offered a policy, but —

Q. Who is —

A. — what's it mean?

Q. Who is Roadway?

MS. KAMP: If I could, for the record —

MR. MATHIAS: No, I have a question.

[41]MS. KAMP: — I think you said Roadway. I believe you meant CRST.

BY THE WITNESS:

A. I meant my — I meant CRST.

BY MR. MATHIAS:

Q. Who's Roadway?

A. Roadway is another trucking company. We have a — we have another case against them in federal district court.

Q. You sued them, too?

A. Yes, we did.

Q. For sexual harassment?

A. No.

Q. What did you sue them for?

A. Race harassment.

Q. Now —

A. But I was referring to what I — the reports I received in the deposition of CRST's chief executive saying that he's continued to get, all the time, complaints of sexual harassment, but that they have a policy against sexual harassment.

So Swift — I don't credit what — I don't credit Swift ever having the view that this was an effective means or would be an effective [42]means to deal with the problem of sexual harassment. I view this as an effort to make — create a defense for probably what they saw as inevitable challenges to their practice.

Q. Okay. Sir, if you know — is it correct to say that this is the reason they gave, but that EEOC didn't accept it, didn't believe it?

A. When you talk about reasons they gave, you're talking — you're asking me to testify about a lawsuit, and in a lawsuit, they — the company speaks through — any company that we — speaks through its lawyers and through the production of documents and the — and the offering of — of witnesses, usually pursuant to notice or subpoena, and those people and those documents all say certain things.

But nobody calls up some Grand EEOC PooBah in the sky and says, this is the reason we did this. I mean, you as an attorney would know that if your client ever called up the grand EEOC inquisitor and said, the reason we did this was X, you'd probably fire the client.

What I will say is they produced a document that states that in order to deal — that [43]they're — not only do they say they're dealing — do they suggest they're dealing with sexual harassment, they suggest that the law requires them to segregate training by sex.

I mean, this — this document is, I think — it was — obviously it was not drafted with the help of Jenner & Block but the document is grossly misleading and wrong. It's wrong in — it's wrong on the law. It's wrong as a matter of public policy, and I think — I think really it's fundamentally a lie.

And it's — and it's the classic type of things we see in sexual harassment cases where management papers — papers the workplace with meaningless policies and never does beans to actually crack down on the issue of sexual harassment. And this is probably one of these documents.

Q. Maybe you're confusing things here, sir, but the Swift document that is attached to the consent decree in that case, the one that I identified as Exhibit A — or Attachment A, rather, the one we've just been talking about here was an internal document at Swift, right?

[44]A. Yes.

Q. And the document says that it — the reason it gives on its face for this procedure of same sex training is, in order to comply with the sexual harassment act guidelines.

That's what it says, right?

A. Those are the words that are on the paper.

Q. So EEOC doesn't believe that and didn't believe that, correct? You thought it was a pretext of some kind, correct?

A. I think that the people who were litigating this case did not see this as a defense to this case.

Q. And so the EEOC sought punitive damages from Swift, correct, in this case?

A. The EEOC did seek punitive damages in this case from Swift.

Q. The idea of seeking punitive damages is to punish the offending company, in part, and also, to deter others from similar conduct, correct?

A. And to deter the defending company from that kind of conduct in the future, yes sir.

Q. The defending company and other trucking [45]companies, for example, like CRST?

A. Other trucking companies and other employers generally.

Q. So CRST, for example, another trucking company, would be among the other trucking companies that should get the message loud and clear that EEOC will sue any other trucking company who does a similar thing, tries to

— gives a reason of trying to prevent sexual harassment as a reason for instituting a same sex training program, correct?

A. No.

Q. Explain.

A. I think the message, if anything, that CRST should have gotten — I — first of all, I'm not even — I don't even know whether CRST was aware at the time that our lawsuit was initiated or during the period of time leading up to it that Swift had been sued. You know, maybe they were, maybe they weren't.

But let's assume a hypothetical state is they had perfect knowledge of the EEOC's actions of Swift. What were the lessons they should have got from that? Do not segregate training by sex. Don't do it, period. You cannot justify segregating

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APPENDIX R — EXCERPTS OF DEPOSITION OF TEQUILA JACKSON, TAKEN JANUARY 14, 2009

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendants.

The videotaped deposition of TEQUILA JACKSON, called for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before KRISTIN C. BRAJKOVICH, a Certified Shorthand Reporter, CSR, No. 84-3810, of said state, at Suite 4000, 330 North Wabash Avenue, Chicago, Illinois, on the 14th day of January, A.D. 2009, at 2:25 p.m.

***

[16]Q. When you say they tried to get rid of you, what happened?

Appendix R

A. When I talked to CRST — the whole time I was with CRST, I had problems as far as harassment. I tried to talk to my dispatcher at the time, which was Brian Bush, about these things [17]that I was going through with CRST. He kind of put it to the side.

The last straw was when I had the incident with Leon Smith, and I called CRST and told them that I was going through this on a Friday. They made me sit in a truck with him over the weekend before they did anything Monday. I went home. They finally brought me to Chicago and then they put me on the bus home, and that is when I told CRST that 1 didn't want to come back. But they was trying to fire me anyway so —

Q. What do you mean they were trying to fire you?

A. They — well, they was saying that because I had incidents and the people that I was with was trainers, they all failed me. They was thinking about letting me go.

I was leaving because I had so many problems with CRST, and they never ever fixed any of the problems. They just put me with another problem. They never tried to fixing anything, so I decided to leave.

Q. So you left there voluntarily?

A. Yes.

***

Appendix R

[73]Q. Okay. Who was your next trainer?

A. The last trainer was Leon.

Q. What was Leon's last name?

A. Smith, I believe.

Q. Smith?

A. Yeah.

Q. How long did you drive with Mr. Smith?

A. I had to stay on the truck with him until I left CRST, and I don't know — I can't even tell you exactly what time period that was. I got the call from CRST for them to take me all of the way back up to Carlisle, Pennsylvania, so I could get another trainer because he was out of— I was out of the way because I was in Atlanta.

Q. Back up now. Start over.

A. Because I was in Atlanta—

Q. This is after you got changed from the Hispanic, right?

A. Right. They put me on a bus back to Carlisle, Pennsylvania.

[74]Q. All right. To meet Mr. Smith?

A. Right.

Q. Okay. I'm with you.

A. When I got on the — he was — he started off for those couple of hours, he was an okay guy. He took me — he said, I take all of my trainees out to Applebee's. He took me around the corner. He was like, Order anything that you want off the menu. He was like, I'll pay for it. He said, I do all of my trainees like this because, you know, I want you — all of them to succeed. He was like, I know you have a couple of incidents, he was like, but when I finish — when you finish driving with me, you'll be able to do everything that they wanted you to do.

Q. At the time that you were assigned to drive with Mr. Smith, how would you describe your skills as a truck driver?

A. I was good at switching gears. I was good at driving but — I think I was an okay driver. I'm ain't going to say that I was the best. I think I did need a little work, but other than that, you know, I was not even a driver for six months, so, you know, everybody starts off not [75]being the best.

Q. Okay. So your relationship with Mr. Smith started off good?

A. Right.

Q. And then what happened?

Appendix R

A. He had conversations about me. I remember sitting driving — because he wanted me to do this 11-hour thing. This five on and five off, he did not want me to do it. He said, We are going to do this 11-hour thing. You are going to drive the 11 hours straight. I was like, Oh, I can handle that. I have done it before. That is not something new.

He was on the phone with one of his friends, don't know her name, don't care to know her name. She — they was talking about how he was attracted to, you know, small, petite girls. He said that I look exotic, like I look like I'm from the Caribbeans or Africa. He constantly talked to her about me all of the time, and I guess she gave him the fuel on the other end because he started trying to talk to me how he thought that I was good looking, how he thought, you know, it's just me and him in the truck. He won't tell nobody if we have [76]sex.

He even propositioned me to take me to Jamaica with him. He was like, I'm going to Jamaica at the end of the year. He was like, I'm going on a cruise. He was like, You can come if — you know, I'll pay for your ticket. You can come with me if you want to. And I was like, I don't even know you to be even going anywhere with you.

I called CRST, asked for a change in the driver. They told me if I changed again, I was going to get fired, so I better stick this one out.

Q. Did you tell them about what he had been saying to you?

A. No. I just said I was uncomfortable.

Q. Okay. Who did you talk to?

A. Brian Bush.

Q. And did he ask you why you were uncomfortable?

A. No. He didn't seem to care.

Q. Okay.

A. He just was like, Well, Tequila, you have been through this many people. You're always saying that it's them that's doing — saying stuff and doing something, but to me it's everybody [77]complaining against you, so you are going to either deal with it or you are going to either quit or get fired, one of those two. You got to go through this training.

They also told me that if I leave before my six months, that I would have to pay every cent, dime, and nickel that I owe them. I stayed on the truck with him.

***

[84]Q. All right. Did you report that to anyone at CRST?

A. No, but I did that Friday tell them that —

Q. That Friday being when? How do you remember it was a Friday?

A. Because I had to wait over the weekend before they even got me off the truck.

Q. Do you remember what month that was?

A. August.

Q. And would it have been the end of August?

A. Yeah.

Q. So on Friday, who did you call?

[85]A. I called — it was late dispatch because my dispatcher was gone by that time.

Q. Is this the same day that you encountered the friend at the truck?

A. Yes.

Q. So after that incident, is that when you then decided to call dispatch?

A. I called dispatch because he got really outrageous.

Q. Tell me what happened.

A. Friday — first of all, when he walked around the truck, he — I wore clothes. I wore clothes up to my neck so he could not — I didn't want to lead him on or make him feel like I wanted to do this. So I made sure I had

kept on most of my — what we call down South, the street clothes, like this. Not night clothes. I did not even wear night clothes because I was scared that he was going to do something. He would tell me that he was go to rape me, he was going to rape me, he was going to take it. That's what he said.

Q. When did he tell you that?

A. He told me that on Friday. He was telling me that during the trip.

[86]Q. Okay. Let's back up. I am trying to get a sense — because you don't know how long you were with him, right?

A. Right. I'm not — I'm not sure how long —

Q. Was it more than a week?

A. Yeah.

Q. So this would have been a second Friday or a third Friday?

A. I can't give you a time, date, or—I just know it was a Friday.

Q. All right. So you've talked about how he told you that you were exotic and beautiful. You told me about how he offered to take you to Jamaica.

A. Right.

Q. You told me about the exchange that you had with the woman who came to visit him?

A. Right.

Q. And then is the next thing that happens is when he tells you that he is going to rape you?

A. He asked me could he have sex with me, and I told him no.

Q. And this was on that Friday?

[87]A. On that Friday. It was like it blew up after he — after her. He asked me can he have sex with me, and I told him no. He told me that he was going to take it and laughed, and he also told me he was going to rape me. He just said, Don't lay down because I'm going to rape you.

At that point in time, I had my cell phone out. I had my sister — my older sister on the phone and I'm telling her — I was like, If something happens to me — if something happens to me, this is what he looks like. This is his truck number. You know, this is his name. If anything happens to me during this time while I'm on this trip, call 911.

Q. Where are you at the time he says this?

A. That time I was out of Atlanta, so there was no way I could get home.

Q. I'm sorry. Was the truck moving?

A. The truck was moving. I was driving.

Q. Okay.

A. He told me after that, he was like, Look, I'm just kidding because he found out I was on the phone with my sister, and I was telling her — he was like, I'm just kidding. He was like, [88]You take everything so personally and you need to loosen up. So we ended up switching drivers. He ended up driving from Valdo — because I made it to Valdosta by that time. He was saying this around then.

Q. Is there some reason you didn't pull off into the next stop?

A. Valdosta was the next stop.

Q. There was no truck stops or rest areas, or anything, gas stations?

A. I stopped in Valdosta.

Q. Okay. How far did you have to drive after he threatened to rape you before you got to that very next stop?

A. I was right around the corner from the truck stop, so it was maybe 20, 30 minutes. I even —

Q. Okay. So from the time he said something, it was 20 to 30 minutes to the next stop?

A. Right.

Q. And then you stopped?

A. Right.

Q. And then what?

[89]A. I even told my family to try to come get me because — because I was afraid. That's when he told me that he was just kidding, that he was going to — he don't know why I'm taking everything personally. Then he said after —

Q. Did you call your dispatcher to report that?

A. I reported that Friday. I told them Friday evening.

Q. Okay. Where were you when you called the dispatch? Were you still at that stop?

A. Yes.

Q. Okay. How did you report it by —

A. I told whatever late night dispatcher, whoever answered.

Q. Qualcomm, cell phone, pay phone?

A. Cell phone.

Q. You used your cell phone?

A. Right.

Q. And you made the call at approximately what time?

A. It was night. I can't tell you exactly a time.

Q. But it was a night dispatcher?

[90]A. Right.

Q. Do you remember who it was?

A. No.

Q. And what did you tell them?

A. I told them, I said, I'm having a situation where this guy is threatening to bring bodily harm to me and the —

Q. Did you tell them that he was threatening rape?

A. Yeah. I told him that he was bringing bodily harm. They should have automatically took him — told him to take me off the truck. The next thing he tells me is, We are night dispatch, we can't do anything. Anything can't be filed until Monday morning, so you have to sit on the truck with him.

***

[105]Q. This is still Friday?

A. Yeah.

Q. Okay.

A. You going to be driving to the place in the morning, so be ready to drive. So he got undressed, and when he got undressed, he had on this green fishnet shirt.

Q. Fishnet what?

A. Shirt. It was a shirt.

Q. Shirt. Okay. I got you.

A. Showing all of his body from the top up and then he had on some tight shorts or something that — I guess you'd say underwear. It's like — they weren't even briefs. They were underwear, some kind of tighty whities or something.

He started saying the same thing. He started touching himself.

Q. Saying the same thing, what?

A. Like he wanted me. He was going to take it. I should just be a woman about mines and just have sex with him. Even though I told him no so many times, he was like, You don't know what a real [106]man is. That's why you are saying no to me. You need to try it, and by this time I had called my family and I was calling. I told my sister to call —

Q. You are at a truck stop while this is going on?

A. Yeah.

Q. Is there some reason you didn't go into the truck stop?

A. I did go in the truck stop.

Q. Pardon?

A. I did go into the truck stop.

Q. I mean, why didn't you leave immediately when he starts in on that whole line and he's standing there in fishnet and underwear?

A. Because the truck is yea big.

Q. Yeah.

A. If I'm up at the top bunk and he's at the bottom bunk, he can block me from getting out of the truck.

Q. Well, where — who was driving into the truck stop?

A. He did.

Q. All right. And where were you when you [107]pulled into the truck stop?

Appendix R

A. I was in the bunk. I had to get away from him. What I did was, they had — CRST either had the button up kind or the zip up kind of curtains that you —

Q. Was he driving in fishnet and underwear?

A. Was he driving in his —

Q. Yeah.

A. No.

Q. So he's fully clothed. He's driving don't the road. He pulls into the truck stop.

A. Right.

Q. All right. He comes to the back of the cab?

A. No. He took off his —

Q. He stayed up in front?

A. Right.

Q. And the curtain is closed?

A. The curtains was closed.

Q. So he undresses up in front?

A. Right.

Q. In front of the windows and everything?

A. Right.

Q. All right. And then —

[108]A. Because he parked in a back area so you can't see into the truck.

Q. Okay. So then he opens the curtains and he comes back and he has the fishnet and the underwear on?

A. Right.

Q. All right. And then what do you do? And he starts saying what you have already told me?

A. Yeah. He starts talking.

Q. And what do you do?

A. I told him that I didn't feel comfortable and I'm about to call the police. I got my sister to call the police.

Q. What did he say when you said that?

A. They ain't going to be able to find you.

Q. Okay.

A. You don't even know where you at.

Q. All right.

A. All you know is you in Florida. You don't even know what highway you on. I said, Well, I can look at the map. Well, we are going to take the map away so you don't know anything, and you going to eventually give it up. Either it's going to be you or me. And I'm sitting here like, I [109]can't believe this. My sister was on the phone, and I told my sister —

Q. Could she hear what was being said?

A. Oh, yes, she could hear. She said she's going to dial 911 and —

Q. Did she?

A. Yes.

Q. Did the police come?

A. No. What she did was because she was in Augusta, they kept asking her, Okay, look, we are going to give you a number to Florida. You call Florida. She called Florida. They ask her, Okay, where is the person at in Florida? She's like, Can you tell me — my nickname is Boo, so everybody calls me Boo. She was like, Well, can you tell me where you at?

Q. What —

A. B-o-o. Boo.

Q. Oh, Boo. Okay.

A. Yeah — So she asking me, Can you tell me where you at? And I'm like, All I know is I got off the interstate, and I turned down this street. And they are like, What is around there? And I'm telling them that it's a bunch of truck stops, the [110]TA, the Pilot, train tracks right across the street. Could you give me the name of the street? No, we are so far off the street.

Q. All right.

A. They said they will send somebody out to look for me, but they never got around to it. I guess they couldn't find me.

Q. And which police department did she call, do you know?

A. I was thinking it would be somebody in Florida.

Q. You don't know if it was a sheriff or a police department?

A. I think it was — most likely it was the police department, but I don't — I remember talking, you know, us being on three-way but I don't know exactly.

Q. You were on the three-way with the police?

A. Yeah. And I was just — I'm telling them and she's telling them the same thing that I'm saying and they just —

Q. And Mr. Smith is standing right there hearing this?

[111]A. Standing right there, don't care.

Q. All right. And then what happens?

A. He ended up standing right there because I told him that I wanted to leave at first. And he said, You're not going anywhere. He just left me — he sat there for a minute. I had to wait until he went to sleep before I even got out the truck. I waited until he went to sleep.

Q. So then eventually he just gets in the bottom bunk?

A. And goes to sleep.

Q. And you're —

A. He didn't go straight to sleep. He talked on the phone, and I'm scared and everything, and I'm just sitting here talking to my sister asking her — she asked me was there any weapons or anything around because if you're going to stay in this truck, you got to sleep with something.

Q. And then what happens?

A. I get out of the truck, and I go into the TA and I —

Q. Did you get back on the truck with Mr. Smith after that?

A. I got in the next morning, when he was [112]up.

Q. Did you call the police when you went into the truck stop?

A. No.

Q. Did you ask where you were at that point in time?

A. I didn't — to tell you the truth, I didn't — I was so terrified, I didn't ask anybody anything. The reason for that is because I have been through this same situation before.

Q. Back when you were 15?

A. Right. So —

Q. But you had already called the police once to ask for their help. Why wouldn't you have called them again now that you knew where they were — where you were?

A. I didn't know where — I still didn't know where I was.

Q. Well, there were people in the truck stop you could have asked?

A. Right. I didn't talk to nobody. They all guys. They all was guys in the truck stop. I didn't talk to none of them. All I did was waited until the morning. I ate and I sat down, and I [113]waited until the morning and —

Q. You stayed in the truck stop all night?

A. Yeah, he stayed in the truck stop all night.

Q. No, did you?

A. Yeah.

Q. Inside the truck stop?

A. Inside TA truck stop.

Q. And there was no women that ever came in the entire time that you were in there that you could have asked for help?

A. No. I just sat and ate. I sat in the little restaurant in TA and ate.

***

[117]Q. So after — after these several threats of rape, you voluntarily get back on the truck with Mr. Smith, right?

A. CRST told me to get back on the truck.

Q. You voluntarily got back on?

MS. VASICHEK: Objection, asked and answered.

BY THE WITNESS:

A. I don't feel like — I feel like I didn't have no choice. I didn't have nobody to come pick me up. CRST —

BY MS. HEFFERN:

Q. Well, you had a lot of choices, right?

MS. VASICHEK: Counsel, would you let her finish her responses —

MS. HEFFERN: Sure.

MS. VASICHEK: — before you cut her off.

MS. HEFFERN: Sure.

BY THE WITNESS:

A. I felt like I didn't have anything. I said, the closer I get to Jacksonville, the sooner [118]I can leave. He knows that I already called the police. He will not try to do anything else, and after that night, he didn't try anything else.

Monday morning comes. We deliver the load. We got to the deliver place. I jumped out of the truck because I seen some people, and I called CRST. And I told them the whole thing that happened. I waited until my — Brian got back, and I told him everything that happened that night. And he asked — he asked me why didn't you tell dispatch what was going on? I said, I did tell dispatch that he was threatening me and everything. They said, We are going to get you off the truck.

During that same time period, he was calling CRST saying things that I have done, so CRST took me off the truck. I asked them, I said, Could you give me a female to come pick me up? They did not give me a female. What they did was give me two males.

They picked me up. I told them that I didn't feel right being on this truck with them, and they was like, This is the only way you can get back to Chicago, you don't have no other way.

So they — so the guys didn't do [119]anything. What they did was, they let me have the bunk the whole time and they sat in the — the guy slept in the front seat and took me all of the way back to Chicago.

BY MS. HEFFERN:

Q. So it was a three-person team that took you back to Chicago, including yourself?

A. Yeah.

Q. Any problems on the trip back to Chicago?

A. No. They — I just told them — they asked me why I got off the truck, and I told them what happened. And they was like, That is ridiculous, he shouldn't have did that, CRST should fire him. And, you know, they was telling me that they felt — they could understand if I'm afraid because they could tell that I was afraid, but they promised they would get me back safely so I could get

back to Chicago.

Q. So the first time you told Brian the whole story would have been that Monday morning when you get off the truck?

A. Right.

Q. And did he report what happened to HR?

[120]MS. VASICHEK: Objection, foundation.

BY MS. HEFFERN:

Q. Do you not know?

A. I talked to somebody else, too, but I can't tell you their name.

Q. Okay. So do you know whether or not it was reported to HR?

A. Yeah, because I got on the phone with somebody else.

Q. All right. A man or a woman?

A. A woman.

Q. And do you know what happened as a result of your complaint?

Appendix R

A. I feel like they did nothing because when I talked to CRST when I got home, after they sent me back to Atlanta, Georgia, I talked to CRST about it. And they was like, Well — well, we feel like the only reason that you said anything about it is because he told you you was a bad driver. And, you know, your third time, this is it. We want to deliberate. I guess that's what they call it. We are going to have to come to a conclusion to see — we are going to have let you go.

I told them — which I did say — I was [121] 21. I got really upset with them, and I told them, I'm going to get me a lawyer and I'm going to sue you for sexual harassment. And they laughed — the lady laughed in my face. She laughed in my face. She's like, Do what you want to do because you're gonna lose. That's exactly what she told me, and I hung up the phone.

****

Supreme Court, U.S.
FILED
JAN 19 2016
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No. 14-1375

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX
VOLUME 2 OF 2 (521a-816a)

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PETITION FOR CERTIORARI FILED MAY 19, 2015
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January 19, 2016

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendants.

The deposition of JAMES T. BARNES, called for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before KRISTIN C. BRAJKOVICH, a Certified Shorthand Reporter, CSR No. 84-3810, of said state, at Suite 2000, 500 West Madison Avenue, Chicago, Illinois, on the 6th day of January, A.D. 2009, at 9:40 a.m.

* * *

[43]Q. Mr. Barnes, you have just been handed what has been marked Barnes Exhibit 1. Do you see on the side

it's numbered with CRST 194833 through 194835. Have you seen Exhibit 1 before?

A. I have.

Q. And could you tell me what it is?

A. It's a document that we use as a tool to track complaints that come in. I had this put in place January of '06. It helps me to look at things — complaints that come in and to be able to track and see if there is any issues that might recur, and if there are issues that are similar, how we might be able to minimize and diminish those by seeing any trends.

Q. And who created the actual — who created Exhibit 1?

A. Lisa Oetken.

Q. What was the purpose for creating the Positive Work Environment Communication?

[44]A. It enables me to use it as a tool to look at complaints that we receive and, again, by looking at it, see if there is any trends. And if there are trends, that we might be able to identify those, and, hopefully, if there is something, that we could address those trends to reduce the number of complaints that are coming in.

Q. And in looking at the — how often have you reviewed the Positive Work Environment Communication since it was created in January of 2006?

A. Well, Lisa and I have talked about this. I have asked her actually to look at it and so at least annually.

Q. You look at it at least annually?

A. In terms of to dissect it, correct.

Q. Can you be any more specific as to how — how often more than annually you might look at it?

A. To determine if I'm seeing any trends or anything like that?

Q. In looking at the Positive Work Environment Communication, have you ever identified any trends?

[45]A. No.

Q. What kind of trends were you looking for?

A. Just are there similar things that are continuing to happen, specifics. You know, similar situations, see if that is the case. If that is, we will address it. A lot of these cases — in fact, most of them, almost all of these cases are individual, and we take them as individual and look at them.

But, again, by looking at that, if they are similar within that, and that is what we try to find.

Q. When you say you are looking for similar things continuing to happen, are you talking about looking at

whether one person – one alleged harasser has repeated complaints about him or her?

A. Well, that is one tool that we can look at, is if there is a complaint that comes in, we can refer to this and say, has there ever been a complaint about this individual.

Q. And, I guess, what other kinds of similar things were you looking for to see if they continued to happen?

[46]A. Well, you know, where is a complaint happening, what type of complaint it is, that kind of stuff.

Q. Can you tell me what kinds of complaints are on the Positive Work Environment Communication?

A. Some will be sexual harassment. Again, all complaints come in to Lisa and I. If they come in to a fleet manager and they are unsure, they will forward those over to Lisa and I.

Some of these issues, quite honestly, they are documented on here, but they may be an argument over, I just don't get along, how do I get off this truck. You know, they are —

Q. So it's your testimony that not all of the complains on the Positive Work Environment Communication are sexual harassment complaints?

A. They are sexual harassment complaints, but as we turn them in and as we investigate, they may not stay that way, but they have been on here.

Q. And what determines whether a complaint is put on the Positive Work Environment Communication chart?

A. When the complaint comes in and somebody thinks that they have been harassed, it will go on [47]this chart. There is also another chart that we have developed that is — this is the positive work. The employee relations one, that is where those would go.

Q. What kinds of complaints go on the employee relations chart?

A. They may be discrepancies. People might get in an argument, might be fighting. It might be I don't — they will call in, just general information that they may call in and say, I am not getting along with this individual. I'm not happy in doing this job, whatever it might be. Those might go on there, but these are sexual harassment claims.

Q. Okay. So a situation where one — a male driver is complaining about his male co-driver, that they don't agree on what kind of music should be on the truck, that would go on the employee relations chart?

A. Correct.

Q. Okay. Are all of the complaints on the Positive Work Environment Communication chart complaints by drivers at CRST Van Expedited?

A. Could you ask that —

[48]Q. Sure. Do you know if all of the complaints -- if these are complaints of sexual harassment by drivers at CRST Van Expedited?

A. Let me look through the list. This is drivers.

Q. Who came up with the title Positive Work Environment Communication?

A. I did.

Q. And how did you come up with that title?

A. Another word — I used it as another word for sexual harassment, is positive work environment, so we will have a positive work environment. That is what I used, to maintain that.

Q. Does Lisa Oetken — is she responsible for putting in all of the information on the chart — if a new complaint comes in, even if you are the person who investigates it, does Lisa enter the information on the chart?

A. Yes.

Q. Did Lisa review the chart for any — looking for trends?

A. Lisa and I looked at it, yes.

Q. And did Lisa identify any trends?

[49]A. No.

Q. Did you give her any kind of instruction of what kind of trends to look for?

A. Specific trends, no.

Q. I think you said that all of the complaining parties were drivers. Are most of the alleged harassers also drivers?

A. Yes.

Q. In reviewing the Positive Work Environment Communication chart, did you — have you ever counted up the number of complaints for each year on the chart?

A. No.

Q. So I take it you did not look to see if the number of complaints varied at all from year to year?

A. No.

Q. Did you look to see whether the alleged harassers tend to be lead drivers or co-drivers?

A. No. I didn't look at that.

Q. Have you ever provided the Positive Work Environment Communication chart to — let me ask it a different way.

Appendix S

Do you know if anybody else at the [50]company has looked at the Positive Work Environment Communication chart other than you and Ms. Oetken?

A. I can't recall.

Q. Do you recall ever giving it to anybody else, other than Ms. Oetken?

A. No, I can't recall.

Q. I think earlier you said that you recall lead drivers being removed from the lead driving program.

Does looking at this chart help refresh your recollection at all, as to anybody who was removed from the lead driver program because of a sexual harassment complaint?

A. It looks like there is a couple that I can see.

Q. Who was that?

A. Victoria Johnson and Willie Phillips.

Q. And what page? Is that on the first page?

A. Yeah.

MR. TRONVOLD: 6/1?

MS. HENRY: I got it.

Appendix S

BY MS. HENRY:

Q. And what about that?

[51]A. He was reinstated after waiting six months.

Q. Does that refer though — there's an NF which I understand means no females?

A. Yes. He had no females, was reinstated, correct.

Q. So Mr. Phillips had a no females restriction which was reinstated after six months?

A. Correct. Wendy West. Suspended from the lead driver program, down at the bottom is a Wendy West on page 1.

Q. And do you — are you able to identity anybody other than Ms. West who was suspended from the lead driver program because of a sexual harassment complaint?

A. No, I don't see it.

Q. Do you recall anybody at CRST being suspended for violating the company's sexual harassment policy?

A. Suspended?

Q. Yeah.

A. No. I don't recall.

Q. If the lead driver is suspended from the lead driving program or terminated from the lead [52]driving program, does that affect their pay?

A. It does.

Q. And how does it affect their pay?

A. It goes down.

Q. I understand that there is an additional — additional amount per mile that somebody earns in the lead driver program; is that right?

A. Correct.

Q. Does being prohibited from driving with females affect a driver's pay at all?

A. No.

Q. Do you consider not being allowed to drive with females to be a form of discipline?

A. It is a form of discipline. For us it's effective.

Q. How is it a form of discipline?

A. By not allowing a driver to drive with a female, what it does is it changes — a complaint comes in. We investigate. And through the investigation, we determine that a driver is not allowed to drive with, say, a female.

What that does is, it gets that driver out of — obviously, the person making the complaint is out of the [53]environment, but also that driver then, you know, it changes their behavior. So by changing their behavior and changing what they are able — you know, that is what we are trying to do. We are trying to correct any behaviors that they have and not allow them to be in the environment that they were in.

* * *

[70]Q. When somebody complains about sexual harassment at CRST, what kind of documentation is created?

A. When somebody talks to us about sexual [71]harassment, what we do is — again, safety first. We get the driver off. Okay? Make sure the driver is safe, and then at that point in time, we will talk to the accuser, listen to what they have to say. We will listen and we will take our investigation notes. We will ask the person that is accusing to make a statement for us, so that is generated. And then anybody else that we also investigate, we will make our notes, ask for statements.

Q. Then what happens to the paperwork that is generated from the complaint, once the investigation is done?

A. Then we have a file, and the file then goes to Ms. Oetken. And then she takes the documentation from there and puts it on this report.

Q. How are the files kept?

A. We have a file cabinet.

Q. And what I'm wondering is, how are the files organized? If you wanted to find a complaint made by Monika Stark, how would you find that file in the file cabinet?

A. Alpha.

[72]Q. So there would be a file —

A. Last name.

Q. — for Ms. Stark?

A. Uh-huh.

Q. And if you wanted to find out if there had ever been complaints of harassment against Bob Smith before, how would you do that?

A. By looking at the Positive Work Environment.

Q. Is there any way to look — are the files at all organized by harasser?

A. By harasser?

MR. MARKOWSKI: I assume you mean alleged harasser?

MS. HENRY: Yes.

BY THE WITNESS:

A. They are filed by alpha and myself included, when I write the file, I don't necessarily — generally would like to say that I would like to put the alleged harasser and the accused in that order, but it's flip flopped. So if I'm looking for somebody or a specific file, I may have to look — if it's John Andrews, I may look under J or I may look under Andrews. I might [73]have to look under both ways.

If he's alleged and the harassed was somebody else, I would have to look under the other person's name, as well.

Q. So on the file is there an indication of the alleged harasser's name or just the complainant?

A. It would be under the complainant. We have both names.

Q. And is that the company's practice for organizing the files, that there is the name of the complainant and the alleged harasser on the file?

A. That is the practice that we have set up, yes.

Q. Now, I understand the Positive Work Environment Communication list was created in January of 2006; is that right?

A. Yes.

Appendix S

Q. Prior to January of 2006, if you wanted to find out if complaints of harassment had been made against an alleged harasser before, how would you do that?

A. I would have had to look in the file or — myself or Lisa. Again, we are the only two [74]that investigate these issues. I would ask her, Do you recall, something like this, this. And at that point in time, she and I would have had remembrance of it or we look in the file.

Q. So would you have to look through all of the files?

A. All of the files? We just — we have a name that is on the Positive Work Environment. That would be one file cabinet, so all of the files wouldn't be that many.

Q. I'm talking about before the Positive Work Environment chart though, if you wanted to find the alleged harasser, you would either have to remember that there had been a complaint against the person before or look through the files that you had of complaints; is that right?

A. We would have had a file cabinet, yes.

Q. And you said on the Positive Work Environment Communication that there are not that many complaints on this exhibit?

A. Well, I didn't say that there aren't that many. Looking at this — again, you asked me earlier did I count specific. No, I have not counted specific.

Appendix S

[75]Do I know roughly what we get, probably three to five complaints a month on average. That is kind of what I have surmised.

Q. Do you know how many sexual harassment complaints the company has received this year?

A. Specifically January — well, '09?

Q. Well, in '08?

A. '08. Again, I guess — I would say, three to five a month, so anywhere from 40 to 50 complaints is what we had received.

Q. Do you know if the number of complaints that the company received of — do you know if the number of sexual harassment complaints that the company received in 2008 was higher or lower than the number of complaints it received in 2007?

A. I have not dissected over '08s yet, but I'm going to say close to similar, with more drivers.

Q. Do you know if the number of complaints in 2007 was lower than the — lower or higher than the number of complaints received in 2005? I'm talking about sexual harassment complaints.

A. I don't know specifically, no.

Q. Have you ever looked to see whether the [76]number of complaints that the company received in 2007 or 2008 is lower than what the company received in 2005? Let me ask it a different way.

Have you ever looked to see whether the number of complaints that the company receives of sexual harassment is decreasing over time?

A. That is hard to say, decreasing over time, because we are not — it's relative to the number of drivers. Since I have come, the number of drivers have gone up, and I guess what I have looked at in the past, not specific numbers but I have seen it in the past, is that for the number of drivers increasing and a rough guess — rough look at, it would be similar. I wouldn't necessarily say increase or decrease. I don't know specifically.

* * *

[120]Q. It says in the Positive Work Environment Process page, the second page of Exhibit 2, that one of the disciplinary actions that may be taken if there is a complaint of harassment or discrimination is probation. Do you see that?

A. I do.

Q. Do you recall any driver ever receiving probation because of a sexual harassment complaint?

A. Not that I recall, no.

Appendix S

* * *

[139]Q. Mr. Barnes, do you recognize the documents in Exhibit 6?

A. I do.

Q. Is the first two pages a request for information from the EEOC regarding Karen Shank's charge of discrimination?

A. Correct.

Q. And then beginning on the page that is marked at the bottom CRST 36110, is that your response to the request for information?

A. 36 — 36110. It is.

Q. Okay. And it indicates that you mailed the response on December 7th of '05?

A. Correct.

Q. If you look at Question No. 4 of the request for information, it says, "State whether any complaints of sexual harassment, excluding the charging party's, have ever been made formally or informally. If so, provide the following information regarding the complaints."

Do you see that?

Appendix S

[140]A. No. 4? State whether any complaints. Yeah.

Q. And could you tell me what CRST's response was to Question No. 4 to the request for information?

A. Exhibit D. Okay. I have listed two names.

Q. And whose complaints are listed?

A. Lori Essig and Tamara Thiel.

Q. Was that response accurate?

A. When I had done this, the only thing could say is I misunderstood and didn't have the — made an error.

Q. So the response to the Request For Information No. 4 were two complaints that were identified. That was not accurate?

A. That would have been inaccurate on my part.

Q. Do you recall what you understood Question No. 4 to be asking?

A. I can't say for sure. I can't recall.

Q. As you are reading it here today, do you understand that the EEOC was asking for a list of any type of formal or informal sexual harassment [141]complaints made to CRST?

A. Correct.

Appendix S

Q. And if you look at the Positive Work Environment Communication, Exhibit 1, there is, is it fair to say, many more than two complaints of sexual harassment during that time?

A. Correct. It was inaccurate information.

Q. Do you have any idea how it came to be that you identified Lori Essig and Tamara Thiel's complaints of harassment in response to Question No. 4?

A. I can't recall. I have to look at the file again. Like I said, there obviously is a mistake on my part that I just misunderstood the question or something.

* * * *

APPENDIX T — EXCERPTS OF DEPOSITION OF LISA MARY OETKEN, TAKEN DECEMBER 30, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendants.

The deposition of LISA MARY OETKEN, called for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before KRISTIN C. BRAJKOVICH, a Certified Shorthand Reporter, CSR No. 84-3810, of said state, at Suite 2000, 500 West Madison Avenue, Chicago, Illinois, on the 30th day of December, A.D. 2008, at 9:42 a.m.

* * *

[120]Do you have a sense of whether most of [121] them are — most of these complaints are women telling you the truth about what happened to them on the truck?

A. Honestly, when we get a complaint of harassment, it doesn't matter if what they are saying is the truth or not. We separate them, and they are no longer subjected to the harassment. So, I mean, the — the fact if the harassment is true or not does not make a difference in our action.

Q. But do you — is it your impression from talking to most of the women involved here or the ones that you have spoken to, that they are telling you the truth? Do you have an opinion one way or another?

A. No, because I think as an investigator and as someone in human resources, we need to stay fair to both employees.

Q. Well, I understand that you are treating both sides fairly, but do you have — is it your opinion that the women are being truthful, when they are telling you what is happening on the truck, regardless of how it affects what you do to the parties?

[122] A. I can't say either way.

Q. You don't have an opinion either way?

A. No.

Q. In determining what kind of discipline you are going to give to a driver or recommend to give to a driver, does your opinion about whether or not the woman is telling the truth ever play into that?

Appendix T

A. No. Just like I said, when we hear a complaint, it doesn't matter whether we believe they are telling the truth or not, they are separated from the harassment and — from the alleged harassment and that person will no longer drive with the person that she is alleging the harassment on

* * * *

APPENDIX U — EXCERPTS OF DEPOSITION OF LESLIE MECHELLE SCHUDER, TAKEN DECEMBER 19, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Civil Action File No. 1:07-CV-95

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

DEPOSITION OF LESLIE MECHELLE SCHUDER

December 19, 2008
9:16 a.m.

EEOC SAM NUNN ATLANTA FEDERAL CENTER
100 Alabama Street, S.W.
Atlanta, Georgia 30303

Michael W. Almand, CCR-B-604

Appendix U

***

[38]Q. Okay. Then you then — you then drove with Irwin Harrell.

A. Yes.

Q. Or is it Harrell or Harl (phonetical.) Do you know?

A. Whatever.

Q. What did you call him?

A. Irwin. That's what he preferred.

Q. All right. And drove with Irwin for about eight days.

A. Yes.

Q. What happened when the two of you were together?

A. I told him, as I told my previous codrivers, that I was in a relationship, that [39]in regard to anything of a physical nature I would go home and be with my boyfriend, so that he would know specifically that there was no furtherance of any action toward me.

Whenever we did start driving together he seemed professional, and after a couple of days he told me that the reason why I was on his truck is because he wanted a white woman, and he referred to me as a snow bunny.

Q. Okay. What is— what was Erwin's race?

A. He was black.

Q. Okay. How about Mr. Branscombe?

A. I don't recall.

Q. How about Len Williams?

A. Len Williams was a black man. Len Williams then—I'm sorry, not Len, but Irwin told me the reason why I was on his truck, there was a black female that he had been driving with and he got her off his truck so that I could be on his truck because he wanted a white woman on his truck, and I reiterated that I was not there for that, I wanted an professional working relationship, I [40]planned to make truck driving my career.

Q. And your driving with — do you recall where you got on the truck, where you and Mr. Harrell joined forces?

A. I don't recall.

Q. Okay. Any specific memories about any of the driving trips that you had with him?

A. We had stopped, I believe in Dallas, one night, and he told me that he wanted me to be with him intimately, that he had wanted me on the truck with him, and that he could train me so that I would be an owner/operator, and I said no thank you, that that's not the way that I wanted to

become an owner/operator. I said, "If this is a problem for you then I will get off your truck," and that's what I did.

Q. How did he respond when you told him that?

A. He said there were lots of other women that would love for — to be in my position. I said, "Well, then, you need to contact one of them."

Q. Did you tell him that in just the [41]tone of voice you're using now?

A. I don't recall. I was very tired at the time, but I did say that.

Q. Did he — did Mr. — did Irvin — Irwin physically touch you in any offensive way?

A. I don't believe so.

Q. How about Len Williams? Did he physically touch you in an offensive way?

A. No.

Q. Okay. Thomas Branscombe, the last truck —

A. I don't remember Mr. Branscombe.

Q. Okay. And Irwin was not a lead driver, or he was the — I guess he was the number one driver but he wasn't a trainer, correct?

A. No, he wasn't a trainer.

Q. All right. You were home for Christmas holiday, then, after driving with Irwin?

A. Uh-huh, yes.

Q. Is that a—did you get off in a—were you let off at home or at an appropriate place when you got off the truck with Irwin?

[42]A. I believe we got off in Fayetteville.

Q. Okay. Did the two of you part on satisfactory terms?

A. He wanted to know what I was going to say about him and I said, "Just what I told you."

Q. And did you — did you report unpleasant or undesirable conduct on the part of Irwin —

A. Yes, I did.

Q. —to your company?

A. I contacted Lisa Laveck. I don't remember when, but she was my point of contact.

Q. When was the first lime you contacted Lisa?

A. I believe it was when the fuel accident happened with Len Williams. It may have been with Dana Funny, but

I believe it was—my dispatcher. I contacted my dispatcher about Dana.

Q. Next person you drove with was Charles Clark?

A. Yes.

[43]Q. Did you have problems with driver Clark?

A. He had a truck and the truck that he had wreaked of urine. Both of the mattresses were stained with urine. He admitted to an incontinent problem, and I said that would have to be dealt with. He wanted a relationship.

Q. With you.

A. Yes. And I said that I was in no position to be in a relationship at the time, I was trying to, you know, further my career in the company, and I told him that I just needed a team driver.

Q. And when you — and you were with him for, what, four or five days?

A. Yes. We ended up in California and I believe that's where I got off the truck in Fontana at our terminal.

Q. Did you ask to be let off the truck?

A. Yes.

Q. And did you report —did you believe that Mr. Clark had given you unwanted attention of a sexual nature?

A. Yes.

[44]Q. Did you report his conduct to Lisa Laveck as well?

A. I believe I reported it to — I forget his name, he was over at the loss prevention at the terminal there.

Q. Okay. In Fontana?

A. Yes.

Q. Okay. And so you reported the conduct when you got off the truck.

A. I told him he was very aggressive and that I wanted to get off the truck because I just didn't feel safe.

Q. What about Mr. Clark's conduct was very aggressive?

A. He raised his voice. It was very loud. Told me that the only reason he was even driving with CRST anymore was because I needed a team driver and that he wanted a relationship with me, and I told him no.

Q. What words did he say that led you to believe he wanted a relationship with you?

A. He told me that.

Q. The words he used were "I want a relationship with you?"

A. I don't remember the exact words.

***

[81]Q. Okay. In — after you drove with Ellen Marley, it appears from the records that the next day you're on the truck with Jeff Hodsen. Do you remember driving with Jeff Hodsen?

A. Yes. I do.

[82] Q. What do you recall about the week that you drove with him?

A. His truck was very clean, he had plants in the window, on the—on the passenger side, he had two laptops and a web cam, and I was immediately suspicious of that and asked him what this was used for, because I had heard of some drivers trying to take pictures of, or unload to a web site their female partners while they slept.

And so I immediately asked him about this, and he swore to me that that was not the case. I said, "I do have some questions regarding this, and I would — in order for me to trust you I would trust you would not use this while I was asleep," and he agreed that he would not use his laptops while I slept, that it was just during the time that I was awake. However, he did use them when I was asleep.

Q. Okay. And how do you know that?

A. I woke up and he was using them and I had felt like there was a presence whenever I awoke, that someone was watching me.

And one time whenever I went to [83]change clothes he was looking in through the curtains at me. I always slept clothed.

Q. Okay.

A. I would never change into my undergarments.

Q. Okay. What — what problems arose, if any, between you and Mr. Hodsen?

A. He — he told me at one point that the reason why he kept his truck so clean and plants in the window is because women are drawn to that, they like a man that is clean.

Q. Did that offend you?

A. I asked him specifically what he meant by that and he said, "Well, I got you on my truck."

Q. Did you choose to go on his truck?

A. I interviewed him before I went to drive with him. I asked him a series of questions in regard to the people that he had driven with, and he said he had no complaints. He did tell me of a woman that would constantly tease him with her breasts.

Q. Okay. What did he tell you about that?

A. He said —excuse me. He said that [84]she had been a codriver of his and would flaunt herself in front of him and that he thought that I would do the same thing.

And I said unequivocally no. I said it's wrong for her to have done what she did, and I will in no way allow his advances.

Q. Okay. And did he make advances?

A. He did.

Q. What advances did he make?

A. He would try to rub my shoulders, try to brush against me, try to touch my hair. He would constantly poke me in the shoulder, and I said that's — that's very annoying to me, especially if I'm driving, it's distracting, and that's a safety issue.

Q. Okay. In fact he did give you a back rub once; right?

A. Yes. I had been driving, I believe either eight or ten hours, and I said, "This in no way means that, you know, this is a gesture from me to you. I have back pain from driving all day, and this will never happen again."

Q. Okay. And so that — you gave him that statement before either requesting or [85]accepting

A. Yes.

Q. —the back rub.

A. Yes.

Q. And then he rubbed your back.

A. Yes.

Q. Did it alleviate some of the pain?

A. It did.

Q. Okay.

A. Because we're not allowed to take any medication, you know, during our shift.

Q. And was that that?

A. Yes.

Q. I mean, he didn't move beyond the —

A. He asked me if he could do it again, I said no.

Q. And this was at a later time he asked you that.

A. Yes.

Q. Was that it?

Appendix U

A. At one point we were at a consignee, and we were in California, it was very early in the morning, I really had no idea where we were at first because it was very unfamiliar to me.

[86]And he had stood in front of me so I was not able to get out of the truck, and I asked him where we were, he said we were at one of our consignees. I said, "Well, I have to go to the bathroom." And finally he, you know, moved out of the way so I could go to the bathroom.

And I had to go back to the truck because there wasn't — I had no idea where I was.

And once he delivered the load there he took me to a very dry, I would say field, but it really wasn't a field, it was just a dirt lot, and I asked him where we were and he said, "You know where we were."

Well, he had told me that he had grown up in California or lived there and he knew various places to go that were secluded, and I said, "I'm not from here, I don't know where we are."

Before that had happened he had gotten into the bunk with me and started trying to grope me, and lick the back of my neck, trying to touch my hair and smell my hair.

[87]And I was on top of my sleeping bag and very quickly got into it and zipped it up, and I told him, "Please just leave me alone, and if you don't I will call the police," and I acted as though I had my cell phone in my bag, and

he said, "Who are they going to believe, you or me," and I said, "I know what the truth is, and they will believe me. If you don't get up from here right now and move on the top bunk I will call the police and they will be here."

"You don't even know where you are," he said. I said, "They can trace my call." I didn't have my phone with me, but I did whatever — whatever I could at the time to try and make him leave me alone.

Q. And did that work?

A. It did. He got on the top bunk but we were still in that same place. I asked him to take me back to the terminal because there were some papers that I had to either sign or fax back to Cedar Rapids in regard to another codriver.

And so — oh, during that time he was laying in the bunk with me he was [88]becoming aroused, and I told him, "There's nothing that's going to happen, you need to leave me alone."

Q. Okay. And after that one started, that was after the time —

A. Just before I told him, "If you don't get off this bunk I'll call the police."

Q. Okay. And at that point are you already in your sleeping bag?

A. Yes, and I stayed there.

Q. Okay.

A. Until he did — I believe he did drive back to the terminal after I kept telling him I have these papers that have to be signed, and that my blood sugar was dropping and I had to eat.

He refused to get me any food, any orange juice for my blood sugar, and then when we did get back to the terminal I went in to — no, when we did get back to the terminal he stood in my way and he said, "You're not going to tell the people in there what happened, are you, because I'll lose my job," and I said, "I'm just going to tell [89]them what the truth is."

Q. Okay. And then what happened?

A. I went in and I made a complaint and they said that they would have someone go with me to get my things out of the truck, so if there is any— any kind of problem that they would be there.

Q. And in fact your things were taken off the truck; correct?

A. Yes, they helped me get them off the truck because I didn't want to step back inside.

Q. Okay. Your stuff was taken off the truck and then the company put you up in a hotel?

A. They did. And that same hotel is the one that he went to, and I told him "Whatever's on the truck leave on the truck, I don't want anything else to do with you."

He went to the hotel room and left a note with $20 in it and whatever was left on the truck and the loss prevention manager there in Fontana said that the only reason why he did that was to save his job.

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APPENDIX V — EXCERPTS OF DEPOSITION OF RHONDA WELLMAN, TAKEN DECEMBER 12, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

VS.

CRST VAN EXPEDITED, INC.,

Defendant.

ORAL VIDEOTAPED DEPOSITION OF RHONDA WELLMAN

ANSWERS AND DEPOSITION OF RHONDA WELLMAN, produced as a witness at the instance of the Defendant, taken in the above-styled and -numbered cause on the 12th day of December, 2008, A.D., beginning at 8:28 a.m., before Kelly Hassell, a Certified Shorthand Reporter in and for the State of Texas, in the offices of United States Equal Employment Opportunity Commission, Dallas District Office, located at 207 South Houston Street, 3rd Floor, Dallas, Texas, in accordance

with the Federal Rules of Civil Procedure and the agreement hereinafter set forth.

* * *

[23]Q. Okay. And who was the next lead driver?

A. His name was Albert Frelix.

Q. And your experience with Mr. Frelix was not so good, correct?

[24]A. He was really bad.

Q. You were on the truck with Mr. Frelix from Tuesday the 11th through Sunday the 16th?

A. That's right.

Q. Okay. What happened while you were on the truck?

A. Oh, just – we don't have enough time to tell you everything that happened on the truck. To start with, when I first got on do you want a short story or a long one?

Q. Well, let me ask you this: You — you've given your story to CRST, correct?

A. Correct, I have.

Q. Okay. And you gave the company a — well, let me hand this to you. You prepared a somewhat lengthy — let

me ask you this: Did you report the conduct to CRST while you were still on the truck with Mr. Frelix?

A. No.

Q. Okay. You reported — you reported the conduct to CRST as soon as you got off the truck right?

A. Yes, sir, I did.

Q. Okay. And you got on the truck in Oklahoma City; you got off the truck in El Paso, Texas?

A. Yes, sir, I did.

(Exhibit Number 614 was marked.)

Q. (BY MR. VISSER) All right. I'll hand you what's been marked as Exhibit Number 614. Will you take a look at [25]Number 614. That – that's the trip inquiry sheets. Does that suggest that you were on the — that after Mr. — you got on the truck with Mr. Frelix in Oklahoma City, you went to Conley, Georgia, then picked up a load in Alpharetta, Georgia, came back across the country as far as El Paso on the 16th?

A. That sounds right, yes.

Q. Okay. So the things that you reported to the company would have happened while you were on that trip?

A. That's right.

Q. All right.

A. Mr. Frelix wouldn't allow me to touch the Qualcomm.

* * *

[34]Q. You weren't allowed to use your cell phone because you didn't have a charger, right?

A. No. He — my cell — my charger disappeared. It was in my purse. He — first of all, he told me I couldn't make any phone calls at all and I couldn't use the Qualcomm. I couldn't — and since he wouldn't let me [35] charge my phone, my phone went dead. And even when I wanted to make an emergency phone call, well, those cell phones kind of disable you because you don't remember people's numbers.

* * *

[37]Q. Okay. Had he already decided — had the two of you decided already to — to part ways by the time you [38]stopped in El Paso?

A. Oh, I wanted off the truck. I wanted off the truck in less than 30 minutes.

Q. Did—

A. I wrote in there, I had said, this is not going to work. I'm not going to tell you when my period starts and

I'm not sleeping on the top bunk. And I told him about the lady that I knew that I personally knew that I went to church with and she was a quadriplegic because her — the guy that she was driving with fell asleep at the wheel and she came flying out of the top bunk. And that's when he really started getting angry with me and that was within 30 minutes of getting on the truck. And I told him I wanted to get off and he refused. It's all in that letter. He refused me getting off the truck. I said, please turn around. You've got to let me off. I said, this is not going to work out. I will not sleep on the top bunk.

And he had demanded — as it is in the letter, he had demanded that I — that I told him the very second that my period starts.

Q. And the way that conversation came up was that you raised the subject about what his practice was on bathing and showering, correct?

A. Yes, because I had heard that some — it was a rumor that truckers only bathed once a week and that some [39]really do. I think some really do. But I wanted to know that I was going to get to shower every other day or something. He said every other day and I said, that's fine. And then the next thing he said was, you know, you need to know the rules of the truck, and he started giving them to me and one of them was that he told me that I tell him the very second my period starts. And I said, mister, I don't even tell anybody that. I am not telling you that. That is personal. I said, that is personal and private and it's embarrassing, you know, and he —

Q. Did you tell him that just kind of like you told me that'?

A. Oh, yes. No. I said, Mr. Frelix — because I didn't know him, I called him Mr. Frelix. He said I could call him Albert — I mean, Albert, but I didn't.

Q. Okay. And what did— what did you— what did you tell him? Did you tell him pretty much what you just told me?

A. Yes. And be said, you will tell me. You will tell me the very minute. I don't want to — I am not going to smell your blood.

Q. Is that what— is that— are those the words that he used?

A. Oh, he used much worse words.

Q. Okay. And what did he— go ahead.

[40]A. I wrote it in the —

Q. Okay. And what did you say in response to him, if anything?

A. I told him, I'm not telling you. I'm not telling you when my period starts. It's none of your business.

Q. And is that where the two of you left that subject?

A. Yeah. He said, lady, I'm not going to smell — he said, a woman on her period is the smelliest — he just went on and on about it. I can't tell you everything he said about it. But I was humiliated.

Q. Describe Mr. Frelix for me. What did he look like? How big a guy, what race, all that business?

A. Six foot, maybe 40ish black man.

Q. A big guy, average size, slight?

A. I would —I would say probably about 200 pounds.

Q. And essentially, Mr. Frelix, if I can characterize what you've written, he was — he was mean to you during those — from Tuesday to Sunday?

A. Yes.

Q. Did he touch you physically during the time that you worked together?

A. No, sir, he did not.

Q. Did he make a — any sexual propositions towards you?

[41]A. He did not. He did not.

Q. Did he — did he watch or refer to pornography or sex-based themes with regularity when you were on the —

A. He did not

Q. Okay. But he told stories that tried to convince you that he would — that his objective was to break the trainee, so to speak, in order that they follow his ways?

A. He loved to talk about that, yes, sir.

Q. Kind of a braggart?

A. Yeah, kind of like— I don't know. He wanted to be the king of everything. You know, he bragged about he made grown men cry. Every man that got in his truck cried. Every single person he's ever trained he makes cry. He breaks you down and he builds you up like the Army.

* * *

[60]Q. And you were on the truck together with Mr. Bruster-Buckley for about eight days, right?

A. have no idea how many days it was.

Q. Okay. Take a look at that Exhibit Number 614, I think.

A. And if this says it was, then probably it was.

Q. Well, does it— does it make sense that the two of you took a load from Los Angeles to St. Louis?

A. Oh, I don't —

Q. Is that the first — first trip that you took together?

A. I don't remember. I have to — I have to be honest. I don't remember —

Q. Okay.

[61]A. — where we went.

Q. For— does it make sense that you went there, you bounced around Illinois for a day or two, then went back to— out to Colorado, then went from Colorado back to Pennsylvania?

A. I don't remember.

Q. Okay. Do you remember where you and Mr. Bruster-Buckley parted ways?

A. Yes, I do.

Q. Carlisle?

A. Yes.

Q. All right. And why did you and Mr. Bruster-Buckley part ways in Carlisle, Pennsylvania on January 20th?

A. Because he was a pervert.

Q. Okay. And what about Mr. — in what way was Mr. Dylon Bruster-Buckley a pervert?

A. He was the whole time. At first he was just sitting in the back looking at porno and talking about it and — and talking about it and talking about he's — oh, man, this chick really wants me. Oh, she's going to send me this or that. Oh, do you want to see this and that? I'm like — I'm like, I don't look at that. I don't look at porn. That's — that's — that's not me. It's not part of me. I don't — I don't want to see it. I don't like [62]it. I don't want to see it. I don't appreciate it. There's nothing about it that appeals to me. And I had to tell him a lot of times, just whatever — just to me, It was like — he didn't try to intimidate me. It wasn't really horrible like it was on the truck with Mr. —

Q. Frelix?

A. — Frelix, so —

Q. It's just — it was just distasteful to you?

A. Yes. I didn't — I hated it, but —

Q. Were you able to drive?

A. I was able to — yeah, I was able to drive.

Q. And you were able to — to sleep and do other aspects of your job without being molested?

A. No, he didn't touch me.

Q. Okay. And he didn't proposition you?

A. No, he didn't proposition me.

Q. Okay. And you didn't actually view any of the pornography that he had?

A. No.

Q. He invited you to watch it?

A. He kept asking me end kept trying to show it to me.

Q. Now, did he try to show it to you while you were stopped or while you were moving?

A. While we were stopped and moving? Probably when [63]we were stopped.

Q. Okay. During the time you were on the truck with Mr. Bruster-Buckley, did you do some of the mapping?

A. Yeah.

Q. And were you — did you have free access to the Qualcomm?

A. I didn't know how to use it really.

Q. All right. You weren't restricted in using your cell phone when you were with Mr. Bruster-Buckley, were you?

A. No, my cord was missing.

Q. Okay. You hadn't got that replaced during the time that you were with your sister?

A. No, because there wasn't — it — there I had a hard time finding a store that had the same cord.

Q. All right. Did you ask to have a change of lead drivers or did Mr. Bruster-Buckley ask to part ways with you?

A. I did.

Q. And how did you go about making that request?

A. I called when I got at the — when I got at the thing, I called.

Q. Which thing? At Carlisle?

A. At the Car — yeah, at the terminal. I'm sorry. Pardon me. And I told her that I just wanted to get off [64]the truck.

Q. Who did you tell that?

A. She — I think it was Lisa Suvak again.

Q. Okay. So you had already talked to HR and so then you talked to them again when you stopped in Carlisle?

A. Yeah.

Q. Had you — had you completed your load when you were at Carlisle? You didn't have an active load going at the time?

A. We may have dropped it and came empty —

Q. Okay.

A. — or we may have been full. I don't — I don't recall.

Q. But— but once you get to Carlisle, that's — that's when you give Lisa a call?

A. Yep.

Q. You didn't -did you-

A. Dylon was really upset.

Q. Who was?

A. Dylon, he was upset. Mr. — Mr. Buckley, he was upset that I got off the truck.

Q. And what — why — how do you know he was upset?

A. Because he came to me and talked to me. I got off — I had another driver help me get my things off and carry them and he was really upset.

[65]Q. And how did he — how did he express being upset?

A. He said, why are you doing this? Why are you — I said, look, I said, I can't drive with a guy who is looking at — at— I just can't go any further. I said, look, you're — you're really a super-good trainer. I mean, as far as what you're trying to teach me and what you're trying to do — do for me and how you're— how you're helping me learn how to back up and you're very adamant about — about shifting and getting me to do it, slow down, turn the corner, everything — I said, everything you're trying to teach me is really good. I said, but your personal habits are just — I said, it's just improper. This is a work— it should be a work environment. It's not a home environment and —and I said, you have no right to — to make me uncomfortable with all of these things—

Q. And how did —

A. — that you're doing.

Q. How did he respond to that?

A. He said, but Rhonda, why didn't you tell me you didn't like that? I said, you know how many times I called you a pervert and told you that I hate pornography? I mean — I mean, I said it straight out.

Q. Did it — was it helpful for the two of you to be able to have that conversation?

[66]A. It was at the very end and I have seen him one time since.

Q. Was it— was there any kind of a problem when you saw him after that?

A. Well, first he came around the comer and he goes, oh, you, like that (indicating) and he walked away and that was it, but that was — I just looked at my co-driver now, Joe, and I said, whatever. And he's like, who is that? I said, okay. Here it goes. So I told him.

Q. Have you seen Albert Frelix since — since El Paso?

A. Yeah, that was scary.

Q. When and where?

A. At the terminal.

Q. Which terminal?

A. The California terminal. As a matter of fact, I went in Mr. Holgart's office and said, Mr. Holgart, can I stay in here? This is the man — this is the man that intimidated me and scared — I'm really afraid of this man.

Q. When was it that you saw Mr. Frelix? Was this before you got on the truck with Mr. Brewster-Buckley or was this some later time when you were out in California?

A. Oh, boy. This was when I was waiting in California.

Q. To get on with Bruster-Buckley?

[67]A. Yeah. Well, the next day we were there and we were training. I believe it was the next day when we were there and he wanted to make sure that I could back; so he — we did like three hours. Mr. Bruster-Buckley made — had me drive around and back for about three hours.

Q. Before you went out?

A. Yeah.

Q. And was he indeed a super —

A. Because I told him — I'm sorry. I interrupted you again.

Q. Well, he— he was a super-good trainer aside from these — the personal habits?

A. Yes, to be truthful, he was.

Q. Okay. It's reported somewhere in here that be slept in the nude?

A. Yes, he did. He said he did.

Q. He told you that in advance that he did, correct?

A. In advance? I mean, a couple days later.

Q. Okay.

A. I don't — I don't think that's in advance.

Q. You didn't ever observe him in the nude, did you?

A. He came up front one time.

Q. Completely nude?

A. Yes.

Q. Where were you?

[68]A. I was driving.

Q. Okay. But did he tell you that he slept in the nude and that you should announce yourself before you went the back if he was in —

A. Yeah, he did.

Q. Okay.

A. So I didn't go back there. Besides, I was driving.

Q. Okay.

A. I said — I told him that he shouldn't do that if the truck is stopped and we both are — and I said, but with the curtains shut, you know, people change back there. It's like you know —

Q. And that was — that was an acceptable arrangement for you?

A. Not really. I thought that was very unusual.

Q. Okay. Did you object to it?

A. Well, I can't tell him what to do when the curtain is shut and he's back there.

MR. VISSER: Okay. Let's — let's take a break right now. We're about out of tape. And we'll start again in Carlisle, Pennsylvania.

THE VIDEOGRAPHER: We're now off the record. The time is 9:59.

(Break was taken)

[69] THE VIDEOGRAPHER: We're now back on the record at 10:14.

Q. (BY MR. VISSER) All right. Ms. Wellman, you were driving with Mr. Bruster-Buckley. Did he — did he request — have anything to do with request — I take it he did not want to change drivers?

A. No, he didn't.

Q. Okay. Did he do anything else that you found to be offensive or creating a hostile work environment while you were on the truck with him?

A. Yes, he did.

Q. What did he do?

A. He came in the front seat the day before I decided to get off the truck. He came up in the front seat while I was driving and he was sitting there and he talked — from the time I got on the truck, he talked about having a — this was really uncomfortable because he was talking about having a really large penis and that — that's the — that's what he sends pictures of all the time and his — and girls send pictures to him and he sends pictures to them and he already had loaded a whole bunch of pictures on there because I didn't see it. You have a little camera or something. He didn't have nothing like that. But he was always talking about it and he came up in the front and he said he wanted to show it to me.

[70]A. And I told him —

Q. Wanted to show you the picture or that he wanted to show you his penis?

A. No, he wanted to show it to me.

Q. Uh-huh. What did he say exactly?

A. Oh, that was a long time ago, but he said — he said that he had shown it to one other driver. She was — he said — he described her and he said she was a black girl and she wanted to see it; so he had showed it to her and she liked it and he wanted to know if I wanted to see it too.

Q. Okay. He was dressed at the time that he was making this offer to you?

A. Sure. Yes, he was.

Q. It was in January, right?

A. Uh-huh. That was when I was driving with him.

Q. So he's in the back, comes up to the passenger seat?

A. Yeah, he's in the passenger seat.

Q. You're — you're driving?

A. Yeah.

Q. And he had asked you if you wanted to see his penis?

A. Yep.

Q. I mean, is that — was it accompanied by any [71] further discussion or that's just the question he posed?

A. That was just — he was rubbing his pants in the front and saying — and again talking about how large it was. And again, I was telling him, you're perverted. You know, why are — you're obsessed with your own body, you know? And I kept telling him, you're obsessed with your own body. Why are you— why are you like that? And so —

Q. What did he say when you asked him that?

A. He said, most women like it.

Q. But that — what would that have to do with him being obsessed with his own body?

A. Because he wanted to show it to me.

Q. Did he show it to you?

A. Yes, he did.

Q. While you were driving right there?

A. Yes.

Q. Did you report that to the company?

A. He took it out.

Q. Okay. In what — did he — what was he — what was he wearing?

A. He un — well, he was — like I said, he was touching himself.

Q. Was he wearing, what pants with a zip-fly front or was he wearing sweatpants or —

A. Just regular jeans.

[72]Q. Okay.

A. And he put one hand at the bottom and one hand over and he was trying to — he kept saying — even he turned on the light so the reflection was right there in front. I mean, the reflection of him sitting in the seat was right there in — in the view of— it was nighttime.

Q. Okay. It was nighttime; so when he turns on the cab light, there's a —

A. The reflection of what he's doing.

Q. — reflection back?

A. Yeah, there's a reflection right there (indicating) in the —right there in the windshield.

Q. Okay.

A. And he keeps on saying, I'm not going to put it back until you — until you look at it. You're not going to believe - you know, because he's still talking about how large it is.

Q. So you're driving for — you're driving, looking forward and watching the road, obviously, right?

A. (Nodded head affirmatively.)

Q. And he — and he asks you — you tell him he's perverted and ask him why he's obsessed with his own body, right?

A. Uh-huh.

Q. You have to say —

[73]A. Yes. Yes. I'm sorry.

Q. And did you — did you specifically ask him not to expose himself to you?

A. Yeah, I told him, I said don't do that again. I said — I said, put it back. I said, don't do that again. I said — I said, Dylon, this is not working out. You're a really good trainer, but I said, it's not working. This is not working out. Okay. Okay. I'm sorry. I won't do that again.

Q. And — and what — what exactly is it that he did?

A. Took his penis out and held it like this with two hands (indicating).

Q. Okay. And you know this because you looked or because you saw it in the — this reflection in the mirror?

A. I saw it in the reflection in the mirror and he said he wasn't putting it back until I looked.

Q. So you looked in order to get him to —

A. So I said, okay, I looked. I said, okay, I looked. Now put it away and go away.

Q. Okay. And about how long was — was his penis exposed?

A. He pulled it out, sitting like this (indicating) with it, kind of moving it. Probably, I don't know, a couple minutes.

[74] Q. Was he — was he masturbating?

A. Well, he was before he pulled his pants down. Well, he was touching his jeans.

Q. Okay. So was his penis erect?

A. Yes, it was.

Q. Okay. And I take it that he did not ejaculate?

A. No, he did not.

Q. You — he — he covers himself and then what, goes back to the back?

A. Oh, gosh.

Q. Did he stay in the —

A. He probably had — well, I was driving; so he had to get some rest.

Q. Okay. So he went back to the —

A. Right.

Q. Okay. Did you ever tell anybody at the company about that in just the way that you told it to me right now?

A. I believe I told Mr. Holgart — Mr. Holgart at the terminal.

Q. Okay.

A. I don't know if —

Q. Because you were about to come to — you were just getting off the truck. You got off the truck in Carlisle, right?

[75]A. Yeah, I did.

Q. So you wouldn't have been back to see Mr. Holgart for quite some time, right?

A. For a while, yeah.

Q. But you talked to Lisa —

A. I told her about him getting up and coming to the front of the truck naked. And when I got off the truck with him, he begged me — he begged me, he said, this — please. Please. He said — he said, was I a good trainer? And I said, as a trainer, you're a really, really good trainer. I said, you're a fabulous trainer. I said, anything I wanted to know and more than — more than what I really — you know, I said, you were very— really on the ball. I mean, he was a really on-the-ball trainer. I said, but your personal habits suck and it's really disgusting and you should — never, ever, ever have — get to drive with another woman again. I said, you're — I said, you should just drive with

men. I said, because you don't know how to act. You don't know how to treat a lady like a lady.

Q. How old a guy was he?

A. He was in his 30s. He was from California and he had hair down to here (indicating) and — and he thought he was pretty hot.

Q. Okay.

[76]A. He thinks he's — he thinks he's pretty much God's gift to women, so —

Q. And how is it that you— how is it that you draw that conclusion?

A. Oh, because he talked about himself all the time.

Q. Okay.

A. I mean, he — he sent pictures and everybody — and, oh, they love my long hair. He was a blonde and — you know, I'm a California surfer and all this stuff that he used to talk about. But he was a totally different personality than Mr. Frelix, that's for sure.

Q. Okay. So when you talked to Lisa and reported that — what is it — what did — what did — you told the people at CRST that he was always watching the porn, right?

A. Yes, I did, because it was true.

Q. And you didn't — you didn't mention that he had exposed his erect penis to you, did you?

A. No. He asked me not to and I didn't do it. I didn't tell.

* * *

[77]Q. (BY MR. VISSER) The trip inquiry sheet, which I think it may be the third sheet, it shows you and Mr. Flowers — you being assigned to Mr. Flowers's truck as early as January 21st, but you don't really — it doesn't [78]look like you left Pennsylvania until January 28th?

A. Okay. That could be.

Q. So does that— so does being in the hotel or motel for about a week sound about right?

A. Yeah, sure.

Q. And together, you and Mr. Flowers went from Pennsylvania out to Utah, and then from Utah went back towards Wichita, Kansas?

A. Yeah. We went — yeah, we stopped in Colby. That's where it ended.

Q. Let me ask you this: Did you finish your training — had you finished training by the time you completed your time with Mr. Flowers?

A. Yes.

Q. Okay.

A. They had determined that it could be finished, that there was nothing —

Q. So even though it wasn't 28 driving days, it had taken more than two months —

A. Yes.

Q. — and you had had a lot of different experiences?

A. Yes.

Q. How was Mr. Flowers as a trainer?

A. He was a good trainer.

[79]Q. And if I understand it right, you met Mr. Flowers initially during your orientation in Cedar Rapids?

A. Yes, sir.

Q. And he's the guy that jumped this —

A. Yes.

Q. — later-apologetic white guy that cornered you?

A. Yes.

Q. And did you — had you encountered Mr. Flowers again from December through late January when he picked you up in Carlisle?

A. Nope.

Q. How is it that you happened to get in the truck with Mr. Flowers?

A. Okay. Mr. Flowers, he said, look, If your other trainer doesn't work out, if anything happens —this was before I even rode with Mr. Newport — he said, give me a call and If I don't have anybody, I'll see if I can get you on. So when— when it happened that I had got off the — that my first trainer broke his ankle and I tried to get on with Mr. Flowers, but he already had — he was already training somebody. So that's why I ended up with Frelix and then after that, Buckley. And then finally he actually became free after that and that was by total coincidence.

Q. So the — so the two of you had requested each other or you had requested him?

[80]A. I said, well, I got to have one more trainer and at least I've met this guy. You know, he seemed like he would be fine.

Q. And as a trainer, he was?

A. As a trainer, he was.

Q. Okay. Did he — during the time you were together on the truck, did he engage in inappropriate sex-based conduct?

A. Sex-based conduct?

Q. Did— did he proposition you?

A. Yes, he did.

Q. Okay. And how so?

A. He — he asked me if I wanted to be with him.

Q. Okay.

A. And I said, well, what do you mean? He said, well, like a couple. And I said, well, I'm — I don't want to. I said, I like you as a person and— but no, I don't want it. And we were— at the time, we were in — he had been really nice up to that point. He had — he bought me stuffed animals. I thought that was really strange and I kept thinking, why is he buying me stuffed animals? But then when we got into Salt Lake City, Utah and we were there, then I kind of got the gist of what he — what he wanted because then he said he wanted to be together with me, you know?

[81]Q. Were those the words he used?

A. Yeah. He's an older man and he was trying to put it in a — and I told him no, that I wasn't interested, and I felt really uncomfortable; so I just got off the truck and

stayed inside the truck stop watching the— they have a big-screen TV and I sat next to a lady and I told her, I said, look, I said, I've been through so much; and I told her about my first trainer was great, second trainer, third trainer, and that this man seems so nice, but now he's starting to ask me for, you know, sexual favors and I — she goes, well, just stay up here and watch TV with me; so I did.

And the next day he was— I mean, I came back on the truck very late after I thought he was already asleep and I crawled up on — in— on the bottom bunk. He was— he was— he let me have the bottom bunk. He slept in the top. So I got in the truck and he was on the top bunk and I got on the bottom and it was — he didn't say anything else, but the next day he was very upset because I didn't come back and he said —he said, well, why don't you want to be with me? You don't like me? You don't think I'm a nice guy? You're not attracted to me? You don't like me because I'm black? I'm like, no. I said no. And I called him Mell. I called him by his first name because he— you know, he was actually nicer and I had met [82]him before.

So I said, no, Mell, I'm not. I don't want to be with you. I don't want to be with anybody. And I will be looking for a lady co-driver, although I never found one really. But he said, what are you going to be, a nun? He said, are you a nun? Are you a nun? And I said, no. Stop saying that. I'm not a nun. I just don't want to. I said, I might take that — I might get a CB handle, The Flying Nun. How about that? I said, I'll just be The Flying Nun. And then he just kind of giggled.

Appendix V

And then when we got into Colby, Kansas, that was — you know, we drove — we took the 70 and that was — it was iced over and it was during my last week and he did own his— or leased his own truck; so he was allowed to take the 70 and so we took it through Colorado and into Colby, Kansas. And from there we got iced in and the — and we — we arrived there in the morning and I just got off the truck and he made pancakes or whatever else, but I wasn't on there. He always cooked on his truck. He would make — he made breakfast, lunch and dinner on that truck. He put it — he made it in like a fry pan.

Q. Uh-huh.

A. Like an electric fry pan. He was a really good cook. So he — after that, I just stayed off the truck and — and I came back on and I — I grabbed my - my [83]wallet and I left and he said, aren't you going to eat breakfast with me? I didn't want to eat breakfast with him because I didn't want any more advances. I just wanted to stay away from him, so —

Q. So you went — you went into the truck stop?

A. The truck stop. Well, I stayed there and he goes, bye. He came in and he waved bye. I went, what do you mean "bye"? And, you know, I said — this other truck — truck driver was sitting in the same terminal and he goes, bye? He said, aren't you a student? And I said, yes. I picked up my purse, I started going through the door and he was already in the — he was in the fuel line and he got on the truck. He just got in the truck. And I'm like

yelling, Mell, Mell, and he just drives off and leaves me.

Q. Okay. So had the — had the ice cleared up some?

A. No, not really.

Q. So had — during the time that — about how long into the —you were together driving from January 28th through February 6th, right, nine days?

A. According —

Q. Does that sound about right?

A. About nine days with Mell?

Q. Uh-huh.

A. Gee, I didn't realize it was that long. Yeah, it [84] was just — yeah.

Q. How far into the trip did Mr. Flowers begin making the advances? Like towards Salt —

A. Just a very— the day before — in Salt Lake City.

Q. So in Salt Lake City is when — is when you thought, this is a little too weird?

A. Yeah. With Bruster-Buckley, if we would have stopped long enough, I would have — I would have stayed inside a truck stop, but his truck — his truck – his dispatcher was Laura. She kept us running.

Q. Mr. Buckley's?

A. Uh-huh.

Q. So Mr. Flowers, it looks — it looks like you arrived in Salt Lake on February 1st and then started out from Ogden, Utah on February 4th?

A. Yeah.

Q. So you were laid over, what, over the weekend there?

A. Uh-huh. Yeah, we were there for the weekend.

Q. So —

A. And I stayed inside the truck stop.

Q. So during the time that — was it during the time that you were there over the weekend that Mr. Flowers began to buy you the stuffed animals and made the more direct [85]proposition to you?

A. No, the stuffed animals were a few days before.

Q. Okay. So — so was the propositioning conduct by Mr. Flowers only in the last couple of days on the truck?

A. Just the last few days.

Q. All right.

A. It only happened that — it only happened that one night.

Q. All right. At what point —

A. But he hadn't apologized; so I felt very uncomfortable.

Q. You had already contacted the company about the intimidating conduct of Mr. Frelix. You had contacted them about the —the unusual conduct of Mr. Bruster-Buckley.

Why didn't you contact the company about what Mr. Flowers did?

A. Because I was waiting for him to correct his actions and make an apology. I'm a forgiving person if somebody — if — if he would — I was just waiting for him to say — because he said that he was a believer in God and I was really waiting for him, you know, to ask me to forgive him.

Q. So if he would have straightened up and apologized for his out-of-bounds propositions, that would have made things right, as far as you were concerned, [86]between — between you and Flowers?

A. Yeah. Yeah.

Q. And — but what he does instead is you're sitting in there having — having — having your breakfast in the truck stop, he comes in and yells good-bye across the — across the space of the truck stop restaurant?

Appendix V

A. Yeah, he's walking and going, goodbye, goodbye, goodbye, goodbye, and I'm at the far end. I'm coming. You know, I'm getting my stuff. I'm picking up my purse and my shower stuff because I went — I took — went and took a shower and came back, grabbed a little breakfast sandwich and a coffee and was just sitting there eating my breakfast sandwich and my coffee when he was waving good-bye. So I picked it up and I went out there and I watched him leave and so did the people sitting with me. And right after he left, I'm just standing— he's like, where is he going? You know, the people at the table were like, where is he going? I said, I don't know where he's going. He didn't tell me he was leaving.

And there was a policeman there. After about, oh, 15 minutes, I said. okay. I told the policeman that he had left and he has my things — and he has my personal things because there was a policeman there buying some coffee and whatever else he was buying and I was calling the company and telling them that this man has just [87]left me.

Q. Did you get ahold of somebody at the company?

A. Yes, and I talked to Jim Schommer.

Q. Okay.

A. And I said, I don't know what's up with your drivers. I just actually — I kind of feel bad because I let him have it. I said — I said — I started telling him, you — the — you know, my — I had to put up with this driver and this

driver and these men don't know how to — don't know how to — have no business training women if they don't know that it's just a job, that they're just there for training, and I — I kind of — yeah, I kind of told him that –

Q. Did Mr. —

A. — I wasn't liking CRST very much at that point.

Q. Did Mr. Flowers come back?

A. They sent — they sent us messages by Qualcomm and after he came back out of Wal-Mart— which I had no idea where he was going — after he came back out of Wal-Mart, then he saw the message and he came back.

Q. Was he — was he driving bobtail or did he take the whole rig over to Wal-Mart?

A. He took the whole thing, but you can do that with Wal-Mart.

Q. And he — he came back after seeing a Qualcomm [88]from the company?

A. Yes.

Q. And what happened then? At that point, you take your belongings off of the truck?

A. I asked the policeman to observe me taking my things off the truck and he kept Mr. Flowers there inside the store with him.

* * *

[106]Q. Okay, Anybody else at the company that we haven't talked about today ever not respond to complaints that you made about sexual harassment?

A. Nobody ever really responded to any [107]complaints that I made.

Q. So even though they took the complaints, your position is that the company didn't respond to the complaints that were made?

A. No, They — if — if — like I said, if they would have just validated me –

Q. When is it that you decided to become part of this proceeding?

A. I received a letter saying that there was such —

Q. When?

A. Sometime in October, I believe, I can't give you a date.

Q. Okay, Have you personally observed any other woman being sexually harassed who is an employee of CRST?

A. No, only heard of them.

Q. Okay, The — what are you looking for as being part of this lawsuit?

A. Validation.

Q. Okay. And what would give you that validation?

A. What I was looking for in the first place.

Q. If the company heard your story, then it heard what Mr. Frelix said about what went on in the truck and they're different stories, what would you expect the company to do?

A. Well, they sent me a letter and told me what [108] they — what they were going to do.

Q. Which was?

A. Defend their truck — their trainers.

Q. CRST sent you a letter saying that they would defend their trainers?

A. Yes.

Q. And who was — who signed that letter?

A. I don't remember and I don't — and I've searched high and low for it, but I haven't found it. But they should have a copy of the letter they sent to everyone.

Q. And they sent it to everyone?

A. They — it was a general letter, it wasn't a personal letter.

Q. Okay. So you don't know whether that is pertaining to your particular situation or not?

A. No, it didn't seem — it didn't — it wasn't personal towards me. It seemed like that it was because of the lawsuit that they were sending it to everybody.

Q. Okay. And if, in fact, the company was engaging in a proper process, would you expect them to defend their practices and policies?

A. Well, sure. I guess they would have to protect their — protect themselves.

Q. Would you agree that the company can't really do anything to — more than it's doing now to prevent somebody [109]like Mr. Flowers from making a pass at a co-driver in a cab?

A. I don't —

MS. BARAN: Objection to the extent it calls for speculation about what the company is doing, but you can answer the question.

Q. (BY MR. VISSER) Can you answer the —

MS. BARAN: Ignore what I said. Just answer his question.

Q. (BY MR VISSER) Is there anything more that the company can be doing than it's already doing to prevent —

A. I don't know what they're already doing. I don't know if they're doing anything.

Q. Well, you know the company's policy, right?

A. Yeah, it's on paper.

Q. Okay. And you know that when you've complained, you've been listened to, correct?

A. Yeah, they listened to me and he also told me on the phone that he didn't believe me.

Q. Who told you that?

A. Jim Schommer, He said, I don't believe it. I don't believe any of our trainers would act in such a way. That really made me feel bad.

MR VISSER: We're going to have to take a break right now because we're out of tape.

[110]THE VIDEOGRAPHER: We're now off the record. The time is 11:14.

(Break was taken.)

Appendix V

THE VIDEOGRAPHER: We're now back on the record at 11:21.

Q. (BY MR. VISSER) Okay. Ms. Wellman, what conversation did you have with Jim Schommer? You talked to him — you talked to him in Colby, Kansas when Mr. Flowers drove off, right?

A. Yeah.

Q. Did you speak to him after Mr. Flowers drove off, but before he returned?

A. Yes, sir.

Q. Did you — was that the only time you spoke to Mr. Schommer?

A. I may have spoken to him a couple of times and I spoke to like three or four people that kept giving me to somebody else. And I — I wasn't exactly — I'm not exactly sure who all I spoke with. But the very first time I ever heard Jim Schommer's name was when I was – when they — was that time I talked to him between the times that you said, before — after he left and before —

Q. He came back?

A. — he came back, yes.

Q. So in that 40-minute — somewhere in that [111]40-minute timespan after Mr. Flowers left and before he came back is when you talked to Jim Schommer?

A. Yeah. I don't know— I'm not exactly sure about the timespan.

Q. And you talked to —

A. About 40 minutes.

Q. And you talked to three or four people at the company before you got to Mr. Schommer?

A. I — I don't remember how many people I talked to. Probably three.

Q. All right. And do you —

A. I don't remember.

Q. — do you remember what you told Mr. Schommer?

A. I told him that — that his — that his — that they need to do something about their male drivers. They need to make sure— that they need to make sure that they don't tell them that they will stick up for them and that they won't — that they will cover them, because every single one of them will tell you except for — I have to make an exception. Mr. Newport never — never told me anything bad or that was unkind. He was a really good man.

Q. And Mr. Steele didn't either, the guy you're driving with now?

A. Oh, Mr. — no, he's — he's a good partner, and that's why I've been with him for many months.

[112]Q. And the African guy that was a bad driver didn't say anything about getting away with sexual harassment, did he?

A. No, because he was a co-driver. He wasn't a — he wasn't a trainer.

Q. Okay. And when Mr. Schommer said he — did — did he say he didn't believe or couldn't believe that someone would drive off like Mr. Flowers had?

A. No, he didn't say that he couldn't drive off. He — I told him about him making a pass at me and that's why I thought he left me there. And I told him that I thought the company condones — I said, Mr. Schommer, you guys condone it because every — I said, the ones that have made passes at me have told me that the company will stick up for them and the company will not believe — they believe the trainer, not the student. And I said, and that's wrong. I said, you guys don't believe. I said, that's why it keeps on happening. I mean, I really — I really kind of told him off, I really did.

* * * *

APPENDIX W — EXCERPTS OF DEPOSITION OF SHALITHA ROSS, TAKEN DECEMBER 11, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-CV-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

VS.

CRST VAN EXPEDITED, INC.,

Defendant.

VIDEOTAPED DEPOSITION OF SHALITHA ROSS

ANSWERS AND DEPOSITION OF SHALITHA ROSS, produced as a witness at the instance of the Defendant, taken in the above-styled and numbered cause on the 11th day of December, 2008, A.D., beginning at 9:42 a.m., before Rachel J. Payne, a Certified Shorthand Reporter in and for the State of Texas, in the offices of the Equal Employment Opportunity Commission, located at 207 Houston Street, Dallas, Texas, in accordance with the Rules of Civil Procedure and the agreement hereinafter set forth.

Appendix W

* * *

[46]Q. All right. So now, if we use those dates as our frame of reference, where do you meet – where do you meet Chuck on the first morning of the trip?

A. At the terminal in Dallas/FortWorth.

Q. And is that the first time you meet Chuck in person?

A. It is.

Q. Do you know what time you start – what time you meet him?

A. I think I got there in the morning; I don't remember, but I think it was the morning.

Q. Okay. Got along with him all right in the morning before you left the terminal?

A. It was just the preliminaries. Hi, how are you doing, putting my stuff on the truck.

Q. Did you get any references on Chuck, talk to other CRST people, people he had ever driven with prior to driving a truck with him?

A. No. As far as I know, they've never given us that type of information. They just give us the names [47]and call him.

Q. You didn't ask him for information as to other people he had driven with?

A. No.

Q. Describe how that first day went.

A. Well, after I got in the truck, we went to pick up the load, and then we went to a truck stop, and we got out and I went in to get me something to eat.

Q. So this is just as you're starting the trip?

A. Just as I'm starting the trip.

Q. Okay.

A. So I'm standing in the line ordering my food and he comes up and puts his arm around me, and he tells the people in the restaurant that I'm his wife. And I told him. No, I'm not your wife, and I have a boyfriend, get your arm off of me. So I went and sat down and he came and sat down too, and that's pretty much how it started out, yeah.

Q. So when you had this conversation with Chuck and told him, you know. Take your arm off of me, did he comply?

A. He did.

Q. Okay. How did he take your response to his touching you?

A. Just he apologized. Oh, I'm sorry, you know, that [48]was it.

Q. Okay.

A. And then I went and sat down, and he came and sat down while I was eating.

Q. Did you call or report that activity to anybody at CRST?

A. No.

Q. Okay. So then I assume after the stop, you eventually get back in the tractor and take off?

A. Yep.

Q. And then how does the rest of the day go?

A. It basically went with him telling me that we were getting married, and I was going to go to Africa to meet his family. And I kept reiterating that I had a boyfriend, and I wasn't interested. So that's pretty much where the conversation kept going, back to getting married and back to going to Africa and back to meeting the family. So eventually I just let it die and went back to the sleeping berth started, you know, putting my stuff up so I could lay down and go to sleep.

Q. When was it that you went back to the sleeping berth?

A. After I ate.

Q. Can you give me any time of day so we can kind of have a frame of reference?

[49]A. It was still daytime, the sun was still out, but I don't remember what time it was.

Q. Before lunch, after lunch?

A. I think it was probably lunchtime when I was eating; it was sometime in the afternoon.

Q. Okay. So just so I make sure I'm clear when you say you stopped right away to get food to eat, does that mean that your first stop was around lunchtime?

A. Yes.

Q. Okay. Then you get back in the cab, there's a conversation about you getting married and going back the Africa, he just brings this up having just met you?

A. Having just met me.

Q. And when he says, we're going to get married and go back to Africa, you've explained you're not interested and you have a boyfriend?

A. That's correct.

Q. Does he say it again?

A. He does, he does, and he doesn't let sleeping dogs lie, he keeps saying it, so, yeah.

Q. And I assume his English is good enough that he understands you or do you know?

A. I think so, yeah, yeah.

Q. All right. How many times does he mention the two of you getting married and you going to Africa?

[50]A. I didn't count it, but it was enough to get on my nerves.

Q. Any idea?

A. But I'm not sure how many times.

Q. More than twice?

A. More than twice, yeah.

Q. More than five times?

A. Probably not as many as five somewhere between three and five.

Q. Did you report that to anyone at CRST?

A. No. At that point, I didn't think anything of it.

Q. Why do you say that?

A. Because I felt like he understood, he got it, and he was going to leave me alone.

Q. So you thought by the time you had your last exchange that he had gotten the message?

A. Yeah. I'm not the type that sugarcoats anything, and I can be quite rude when I want to be, so he knew where I was coming from as far as I was concerned. He understood me and he was going to back off, at least that's what I thought.

Q. What was it that he said or did that led you to believe that he understood and was going to back off?

A. Because he got quiet after I went back to the [51]sleeping berth and didn't bring it up anymore, so I thought it was over.

Q. Okay. What happened next during that day?

A. I went to sleep, and I woke up with him on top of me trying to pull my breast up out of my shirt.

Q. Where was the truck at this point in time?

A. Parked. I don't know where we were. Well, when I woke up, I believe we were on an off ramp or an onramp on the freeway.

Q. Can you narrow it down any more than that?

A. I don't remember where we were. I mean, I was asleep, woke up out of my sleep. I don't know where we were.

Q. Did you hear the truck stopping and parking?

A. No, I sleep pretty hard. I do.

Q. What did — what happened?

A. I told him about — cussed him out told him I don't know how they do it in Africa, but in the U.S., you ask before you touch anybody, and then if the woman says it's okay, then you touch them, but you don't touch them beforehand. And he got the message because he started apologizing, and he left well enough alone. I got up out of the bed, and I went — started driving the truck to New York.

* * *

[54]Q. You need to tell me more specifically about exactly what he was doing. I understand what you've already told me he was laying on top of you?

A. Yeah.

Q. Did he have his hand on your —

A. In my shirt on my breast, yeah.

Q. Were you wearing a bra?

A. Yes.

Q. Was his hand inside the bra?

A. Inside the bra —

Q. Okay.

A. — touching the nipple region, yeah.

Q. And that was the first that you were aware of him in your berth was —

A. Yeah.

Q. — when you woke up with his hand on your nipple?

A. Yes.

Q. Describe for me a little bit the berth, what size it is?

A. It's big enough to fit — it has two beds, one like bunk beds, full size, twin up at the top. You can [55]fit a small refrigerator in it. It's a nice size. You can fit quite a bit of stuff, but it's made to stack stuff, you know, back there. Judging from the cab to the sleeping berth, you probably have about the width of this table if not a little bit longer for the sleeping berth.

Q. So that table to me, maybe, looks like five and a half feet?

A. Both tables together —

Q. Right.

A. — is about the size of the sleeping berth.

Q. If I say I'm eyeballing that at five and a half feet is that within —

A. Yeah.

Q. — the range of what you're recollecting?

A. Yeah.

Q. As I understand it, there's a lower berth and upper berth?

A. That's correct.

Q. Were you sleeping on the lower berth or the upper berth?

A. I was sleeping on the lower berth.

Q. Is that your assigned berth or do you trade off?

A. No. You're not allowed to sleep in the top bunk unless there's a cargo net while the truck is rolling; [56]it's against the law.

Q. Okay.

A. So you have to sleep in the bottom if the truck is moving.

Q. Okay. And so I'm still trying to make sure I have a mental image, if he stopped the truck, he can stand up and walk back into this berth area?

A. Yes.

Q. Is it tall enough you can stand up; do you have to crouch down?

A. Oh, no, you can stand up.

Q. So he had climbed into the lower berth with you?

A. That's correct.

Q. Laid on top of you and then put his hand inside your shirt and bra, correct?

A. Yes.

Q. So you push him off; you've told me what you said to him; he apologizes.

A. Yes.

Q. Then what happens? You get up and start driving?

A. I do.

Q. Where does he go?

A. To the sleeping berth. Well, he's still in the sleeping berth, but I guess he goes to bed at that point.

[57]Q. Was it the time to change shifts?

A. It was.

Q. Okay. What did you do once you started driving?

A. That was it. I just drove to New York.

Q. You didn't call in to CRST at that time?

A. I had planned on speaking with my dispatcher in the morning when he came back.

Q. Okay. So when is the first time you contacted CRST with regard to what happened in the cab?

A. It was the following morning.

Q. Okay. About what time?

A. I don't know. I don't know. I don't know. I just know it was in the morning.

Q. Okay. And how did you make contact with CRST at that point?

A. I called them.

Q. Who did you call?

A. I called my dispatcher.

Q. And dispatcher, is that the same thing as fleet manager?

A. Yeah, I guess so, yeah.

Q. Who was your dispatcher?

A. I don't remember the name.

Q. I'm sorry?

A. I don't remember his name.

[58]Q. It was a man?

A. Yeah. I had just gotten him when I got the codriver. When you get into somebody else's truck, whoever their team manager is or their dispatcher is becomes your dispatcher, so whoever his dispatcher was my dispatcher.

Q. You had just gotten a new fleet manager as well as a new codriver?

A. Exactly.

Q. All right. Had you had any problems with the fleet manager, I know it was a short period of time, but up until October 2nd had you gotten along with your fleet manager?

A. Yeah.

Q. And your fleet manager is your direct supervisor, correct?

A. Yes.

MS. HEFFERN: Do you want to go off the record now?

THE VIDEOGRAPHER: We are off the record. The time is 10:41 a.m.

(Break taken from 10:41 to 10:42 a.m.)

THE VIDEOGRAPHER: We are back on the record. Our time is 10:42 a.m. This is the beginning of Tape 2.

[59]MS. ANDERSON: Excuse me Counsel, when you say fleet manager, is that the same person as the dispatcher? Because y'all were saying different people.

Q. (BY MS. HEFFERN) Well, let's clarify that. I thought I had asked earlier whether the dispatcher was the same as the fleet manager?

A. And I think it is, yeah.

Q. When you say dispatcher I say fleet manager, we're talking about the same person?

A. As long as you're talking about the person that sends me out on the load then, yes.

Q. During the time you were at CRST, how did you refer to them?

A. Dispatcher.

Q. Okay. Is that a term you're more comfortable using?

A. It is.

Q. Just for the record, as far as you understand that would be the same as fleet manager?

A. That's correct.

Q. Okay. And I think just before we took our brief break, you'd explained to me that your dispatcher that you were working with was new to you, correct?

A. That's correct.

Q. And although you'd only been exposed to them for [60]a short period of time, you hadn't had any problems or complaints with regard to their actions or instructions; is that correct?

A. Prior to —

Q. Up until?

A. Okay. Yes.

Q. Had you ever met the dispatcher?

A. No.

Q. Tell me what — what happened during the night, any other problems before you called your dispatcher?

A. Yes.

Q. What were the other problems?

A. He slapped me.

Q. Okay. Tell me about that.

A. We were going to deliver the load.

Q. What time is this?

A. Morning. I don't know what time in the morning.

Q. It's before you called the dispatcher?

A. It's before, yes.

Q. Okay.

A. On our way to deliver the load, and he asked me to read the directions off the Qualcom.

Q. Let me back up a second. Last we left off on your recollection of events, you were driving, he was back in the berth sleeping.

Appendix W

[61]A. Yes.

Q. So you drive through the night?

A. I drive to New York.

Q. Okay. What time do you get to New York?

A. I just know it was morning.

Q. Sun is up?

A. Yes.

Q. Is it sometime between 6:00 a.m. and 9:00?

A. Sometime between there, yes.

Q. Okay.

A. And it's his turn to drive now.

Q. Okay.

A. So he's driving.

Q. Do you know when his shift started?

A. No.

Q. Okay. How long do you drive before your shift ends?

A. You can drive anywhere to 10 to 11 hours. I don't remember how many I drove that night, but you can drive anywhere to 10 to 11, and then after that you have to go to lay down or you can't drive anymore at least.

Q. How do you decide when your shift ends?

A. After you've completed that time frame the 10 or 11 hours.

Q. You always drive for 10 or 11 hours straight; is [62]that's correct?

A. Yes.

Q. You can't say after 8, I'm tired, somebody else drive?

A. No.

Q. Okay.

A. You have to do your part.

Q. During the time you drove 10 to 11 hours until you got to New York —

A. Yeah.

Q. — were there any problems during that period of time?

A. No.

Q. So he just stayed back in the berth?

A. Yes.

Q. Did he ever come out up into the cab?

A. Not that I recall.

Q. At some point in time, was it when you got to New York, that he came out of the berth and up into the cab?

A. Yes, because it was his turn to drive.

Q. All right. Then what happened?

A. So he asked me to read the directions from the Qualcom.

Q. He's driving now.

A. He's driving.

[63]Q. Okay.

A. The directions say Exit 11B. When we got to Exit 11, and there was no letters after it, I told him that he needed to turn around. He told me that it said Exit 11B so he was going to keep going. So he kept going, he hit a toll booth. Now, he got upset because he had to pay a toll. I explained to him that they pay it back, don't jump the

tolls, CRST will pay it back. So the lady told him, You need to turn around because there is no Exit 11B, and when he got back on the freeway, he hit another tollbooth. So itw was funny to me. I'm over there busting a seam and crying I'm laughing so hard. So when we get back to Exit 11, I called the Casenec, that's the person we deliver to. Where are you guys located? And they tell me it was Exit 11. I said, see, I told you it was Exit 11, and he smacked me.

Q. So he's in the driver's seat?

A. Yeah.

Q. Tell me, specifically, how the slap occurred.

A. After I made my comment that I told you it was at Exit 11, he slapped me.

Q. Palm of his hand?

A. Palm of the hand, yeah. But it wasn't one of those slap the taste out your mouth slaps, but it made [64]my head fly to the side. It stung pretty good. It stung pretty good.

Q. He slaps you on your left cheek?

A. I think it was the left cheek, yeah, it was the left cheek.

Q. And you say, "it wasn't one of those slap the taste out of your mouth slaps"?

A. No, but it was hard. It was hard.

Q. Leave a mark?

A. No. I went to the restroom to check and it did not, because I had planned on calling the police. But it didn't leave a mark, and I felt like it would be his word against mine, so at that point I called the dispatcher and said get me off the truck.

Q. Did you say anything to him when he slapped you?

A. Yeah.

Q. What did you say?

A. I asked him. What was the fuck was his problem. I told him that he better be lucky that I'm older than what I am now (sic), because there would have been consequences, repercussions had I been younger, because I wouldn't have thought about it before I reacted.

Q. What did you mean?

A. I would have gotten back — we would have been in that truck fighting for the most part because you hit [65]me. I am from Compton, the hood, and you just don't get away with slapping people or hitting people like that where I'm from, we fight back. But now that I'm older, I think before I react, so I didn't want to go to jail, I just left it alone, and I called the dispatcher and said get me off the truck before something else happens. Because you

hit me once, you'll hit me twice, I just wanted to get off the truck.

Q. Where were you when the slap occurred?

A. New York at a truck stop on Exit 11.

Q. So you're actually stopped at the time it occurred?

A. Yes.

Q. So it was after that occurred, that's the first time you called in to your dispatcher?

A. Called the dispatcher to let him know what was going on.

Q. In your recollection, it was sometime in the morning?

A. Yeah. It was still morning.

Q. Any idea what time?

A. It had to be getting closer to noon by that time, but I'm not sure probably somewhere between 10:00 or 11ish.

Q. And this would have been on October 2nd, second [66]day?

A. Yes.

Q. Did you indicate to Chuck that you were either going to call the police or the dispatcher to report the behavior?

A. No. At that point, I was scared of Chuck.

Q. How big of a man is he?

A. Not that big, not that big. He's taller than me, but it don't take much to be taller than me. But just being a man in general, you don't have to be big and burly, they are pretty strong. So I wanted to get out the truck because I didn't want it to come to me having to defend myself, but if I got hit again, I was going to defend myself.

Q. Tell me about the conversation with the dispatcher.

A. I told him basically everything that I told you. I told him about the guy jumping on me the night before trying to pull my breast up out my shirt. I told him about being hit the next morning and that I wanted off the truck. He told me he was going to get me off the truck. He was going to send a message through. I never got that message. Instead, we got sent the trip pack for another load going to Wisconsin.

Q. All right. Let me — I need to walk through this [67]because I don't know enough about the trucking profession to make sure that I understand what that means. When you talked with the dispatcher, he indicated that he was going to get you off?

A. Yes.

Q. What did you understand that to mean?

A. Well, that mean — that meant he was going to get me off the truck. There was a terminal in Carlisle, Pennsylvania, and it's not far from where we were.

Q. Not far, what does that mean?

A. Probably 100 something miles away, if that.

Q. Okay.

A. And he told me that he just needed me to drop off that one load, we had another load to pick up around the corner, and bring that into Carlisle, and he'd get me off the truck and I said, Okay.

Q. Were you okay with that proposal?

A. As long as I got off the truck, I was okay with that. Because I felt like I could keep my mouth shut, and he would leave me alone long enough for me to get off this truck.

Q. Did you have any discussion about staying at the truck stop that you were at —

A. No.

Q. — with your dispatcher?

[68]A. No. He just told me that I needed to be routed to the Carlisle terminal, so I thought that was just how they did it.

* * *

[70]Q. Tell me, specifically, what it was you told the dispatcher as best you can recall, the exact words that you used.

A. I told him that the guy had jumped on me and pulled my breast up out my shirt, and that he had slapped me, and I wanted off the truck, that was just as basic as it got. I want off the truck.

Q. And then what was your expectation as far as the instructions to go to Carlisle; how did you think that it would be communicated to Chuck?

A. He told me that he was going to route us through Carlisle, which simply meant, when they give you the trip pack, it'll have something in the middle of it, you know, go to Carlisle — from New York, go to Carlisle; and then from Carlisle, go to Wisconsin.

Q. How do you get your trip pack?

A. They send it over through the Qualcom and tell you what you need to go pick up, the directions, and the whole nine.

Q. And how did you reach the dispatcher, was it through a cell phone?

A. I want to say I used a pay phone. I don't remember. I don't remember if I used a cell phone or a [71]pay phone.

Q. Could have been a pay phone at the truck stop or your cell phone?

A. Could have been my cell phone, I don't remember.

Q. And you had a cell phone?

A. Yeah. But I had prepaid — it was probably a pay phone, because I had a prepaid cell phone.

Q. Other that calling your dispatcher to report what was happening, did you call anyone else during this time frame to report what was hopping?

A. No. No. Like I said, initially, I thought to call the police, but when I didn't see a mark on my face, I figured it was my word against his, so it would be a waste of time.

Q. Did your dispatcher recommend that you call the police?

A. I don't remember.

(Deposition Exhibit No. 702 marked.)

Q. (BY MS. HEFFERN) Ms. Ross, I'm going to hand you what's been marked as Exhibit 702. And as I hand this to you, I'm going to tell you that I think this is your written statement. It's two pages, unfortunately, I think

your written statement was three and that we are missing one page which we are trying to track down.

A. That's my handwriting.

[72]Q. I'm going to give you a minute to look at that. I think you've indicated that is your handwriting; is that a yes?

A. Yes. I'm sorry. Yeah.

Q. Would you take a look at it and verify my suspicion that we're missing one page?

A. It was Exit 6, my bad. It wasn't Exit 11. I forgot about that.

Q. What's that?

A. That after he slapped me and I asked him what he slapped me for, he said he was just playing. I was just playing with you. Yeah. I forgot about that. Oh, yeah, there's something missing.

Q. I think there is a third page, and we're working to get that?

A. Yeah, but the second page is missing.

Q. We don't have much notice who is going to appear, so we have to scramble to get the records, so I will supplement that once we get it.

A. Was I supposed to give you this one back too?

Q. You've had a chance to review this statement, and I know you've indicated that as you reviewed it, you did recall the comment he made after slapping; otherwise, is at least what we have here today appear to be an accurate report of what happened at that time?

[73]A. Yeah.

Q. And you were explaining to me that your dispatcher indicated he was going to route you through Carlisle where you were going to be to get off at the terminal?

A. Yes.

Q. What happened after that?

A. The dispatcher dropped the ball. Instead of sending the directions including a stopover in Carlisle, he sent directions going straight to Wisconsin.

Q. Okay.

A. So I then told Chuck that we were supposed to be stopping in Carlisle, and he told me it wasn't in the directions, and he wasn't going to stop. I told him, yes, he was, because we were supposed to stop in Carlisle. I never once mentioned the fact that I was getting off the truck, you know. I was trying to keep the peace. So I said Well, pull over at this rest area, and I'm going to call dispatch. So I called dispatch and was waiting and waiting,

at night, there's only three of them, so you tend to wait for a while. While I was waiting on dispatch, my mother called me. I told my mom what happened, she got off the phone with me, she started calling dispatch too. I got back on the phone started calling dispatch again, got another [74]call from my boyfriend at the time. And I told him what happened, and he did the same thing, he called dispatch too, and I think all three of us got in the at the same time to three different dispatchers. I explained what happened, and they would send the messages through right away. I explained to them if they checked the records, they would see that I had been sending message after message after message all day and part of that night the prior night before asking them to get me off this truck because I was afraid of what might happen next. And I was erasing the messages after I sent them because I didn't want him to see them, because, again, I'm trying to keep the peace. So they read everything, they said, Okay, we're going to get you routed through Carlisle; they sent the directions over right away for us to come to Carlisle.

Q. All right. We need to back up here just a minute. It was my understanding the first time you reported any problems was the call to the dispatcher?

A. No. I want to say — I sent messages, now, I don't know if I sent the messages before the call or after the call, but I was sending messages, I know for a fact after, but I don't know if it was before. But I sent detailed messages through the Qualcom to the dispatcher begging to get off the truck. Then I asked [75]them when they send a message back, Watch how they send it, because I didn't want him to know that I was sending messages to them.

Q. Let's back up and see if we can sort out at least your best recollection. You know you sent Qualcom messages —

A. Yes.

Q. — asking to get off the truck?

A. Yes.

Q. How many?

A. Probably about three.

Q. Okay.

A. After the initial phone call, probably about three.

Q. Is it your best recollection that the initial report was by phone as opposed to Qualcom?

A. I think so, yeah. Like I said, I don't remember when I started sending the messages asking to get off the truck, but I think I called first.

Q. And that would have been from the truck stop in New York?

A, Yeah, yeah.

Q. And then — so you're at New York and your waiting for your trip information?

A. Yeah.

[76]Q. Do you recall when you get that?

A. We got that, I believe, during the time that we were dropping off the first load because the second one was, maybe, about a block or two away. It wasn't nowhere from there. The one that was actually headed to Wisconsin, so I think we got the information while we were waiting for that truck to be unloaded off the first load.

Q. So is this still the morning of the 2nd?

A. Yes.

Q. And so then you go to the place to pick up the new load?

A. It might have been the afternoon. I don't remember. But, yeah, we go pick up the second load.

Q. Okay. And then you get out on the road?

A. Yeah.

Q. And by then, you already have all your trip information, and you know that it doesn't have the stop in Carlisle?

A. Exactly.

Q. When you realize that, as you described, the dispatcher has dropped the ball, do you communicate with him through Qualcom?

A. Qualcom, that's when I started sending messages through the Qualcom, I think.

[77]Q. And do you remember what you said?

A. No. I just know it had something to do with getting me off that truck.

Q. Okay. Can you tell whether the dispatch is receiving those on the Qualcom; does it have any kind of —

A. Not unless they send you a message back, no.

Q. So I take it Chuck is still driving?

A. Yes, he was still driving at that point, yeah.

Q. Do you remember getting a response to the Qualcom?

A. No, I can't say that I remember.

Q. Other than sending the Qualcom which you've estimated roughly three, do you try and reach your dispatcher any other way?

A. Yeah, that was when we pulled over at the rest area, and I started calling. I didn't want to call the dispatcher

while I was in the truck, because he would overhear my conversation.

Q. Okay.

A. So that was the reason for the Qualcom messages, but after we pulled over at the rest area, I called here.

Q. How long had you been driving before you pulled over at the rest stop?

[78]A. We were — I don't know where we were. But we weren't far from Pennsylvania; we were still going the right direction.

Q. How long had it been since you picked up the load and started?

A. I don't know. Some hours, I don't remember how many though.

Q. Can you quantify it in any way for me?

A. I just don't remember.

Q. Well, less than three?

A. Maybe, yeah, maybe.

Q. If we look at from the time you made the call, the first call, until the time you stopped at the rest stop, can you quantify that time period?

A. Maybe a couple hours, maybe 3 hours, I'm not sure.

Q. So best estimate is somewhere between two to three hours from the time you made the first call to the dispatcher to the time you made the second call?

A. Yes.

Q. And within that two - to three-hour period, you were also sending some — two to three Qualcom messages?

A. Yeah.

Q. Okay. When you asked Chuck to pull over, he did?

A. He did.

[79]Q. Were there any other problems after the slap — between the time of the slap and stopping at the rest stop as far as Chuck's behavior?

A. Not that I remember, no. I pretty much stayed back there in the sleeping berth to myself.

Q. When you got to the rest stop and got a hold of dispatch, tell me about that conversation, what you said, what the person who you were talking to said.

A. I told them in short what had happened to me about him, you know, jumping on me, trying to take my breast up out of my shirt and also —

Q. You repeated the same information?

A. — him slapping me. Yeah.

Q. Is this a different dispatcher?

A. Yeah. It was the night dispatcher, because my dispatcher had left for the day.

Q. What time is it, then?

A. Maybe — I don't know. It was dark, but I don't remember what time it was. I don't — maybe 6:00, 5:00, I don't know.

Q. You still comfortable with the time frame you gave me before, which is two to three hours had passed from the time you left?

A. Like I said, I don't know. I didn't know how many hours, I'm assuming maybe three or four.

[80]Q. Okay.

A. I don't remember. I don't remember. It's been awhile.

Q. Okay. Do you remember who you talked to on the second phone call?

A. No. I just know it was one of the night dispatchers.

Q. Okay. And you told him about finding him on top of you with his hand on your beast and what else?

A. And that he had hit me.

Q. Okay.

A. And that I had asked my dispatcher to get me off the truck, and had he dropped the ball, and I needed off the truck, and that's when I told him he could read those messages that I had been sending to see what I'm talking about and I needed off the truck. And immediately, he sent the message through to get me to Carlisle, and we went on out to Carlisle.

Q. Were you able to get off the truck at Carlisle?

A. I was.

Q. Any other problems before you got to Carlisle?

A. No, no. He was complaining about having to go to Carlisle, because it wasn't in the direction of Wisconsin, but no, no.

Q. Okay. Once you got to Carlisle, what did CRST [81]provide for you?

A. A cab and a room to stay in since I was getting off of the truck.

Q. Were you satisfied with them providing those things for you?

A. As long as off the truck, yeah.

Q. Tell me what your criticisms are with regard to how CRST responded to your complaints.

A. Well, I'm upset at the fact that the first dispatcher didn't do anything about it. That pisses me off.

Q. Do you have any reason to believe that that was deliberate or whether that was just, as you say, dropping the ball?

A. I don't know. I don't know. I have no reason to believe that, you know, he would have had a problem with me in general, so I would like to think that it wasn't deliberate, but I don't know.

* * *

[90]Q. (BY MS. HEFFERN) Ms. Ross, before we leave, Exhibit 702, I want to ask a couple other follow-up questions about that statement. Specifically, I'm interested in the circumstances under which you wrote that. Do you remember when it was you wrote it and what [91]caused you to write it up?

A. Yeah. I went to — I went to Cedar Rapids, Iowa, which is where the corporate office is to drop off a load — or I don't remember what we were out there for, but we were out there. And they have a driver's meeting where the drivers can come in, we eat for free, you know, pizza and soda, and they have some of the big wigs there. And

they basically talked to us about, you know, policies and changes and, you know, if we have any issues, we can talk to them about it, any grievances. So after the meeting was over with, I decided that I would talk to, I want to say, he was the head of safety.

Q. Okay.

A. I don't remember, though.

Q. George?

A. George, exactly, yeah.

Q. All right.

A. Yep, that's him. And I told him what happened — no, I asked him, I said what's your policy on sexual harassment? And he said, Zero tolerance, and I said, Bullshit, and he said, We need to talk. So he took me over to the office and I explained to him what had happened to me and the fact that to me it seemed like nobody wanted to do anything about it. Immediately, we walked over to the dispatcher, the guy who was my [92]dispatcher at the time who I still can't remember his name, but —

Q. The same guy you had talked to for the first report —

A. Yeah.

Q. — and the morning at the hotel?

A. Yeah.

Q. Okay.

A. So he went over and he asked him why he didn't follow the proper procedures. And he said that a lot of females want off the truck, and they'll lie and say whatever is necessary to get off of it and get a new codriver, so he thought that it was just another situation like that.

Q. This was a conversation that you were present for?

A. Yes.

Q. So it's the three of you George, your dispatcher, and yourself?

A. That's correct.

* * *

[101]Q. What's the first thing George says to the dispatcher?

A. He wanted to know what had happened with the [102]incident with me.

Q. What does he say?

A. I don't remember exactly what was said, but I just remember him asking about the incident.

Q. Okay.

A. That had occurred with me trying to get off that truck.

Q. And then what does the dispatcher respond?

A. He had asked him, you know, why the proper procedures weren't followed and that's when he had told them that a lot of females lie to get off the truck just so they can get a new codriver, and he had assumed that that was — the same thing that happened with me that I just wanted to get off the truck with Chuck.

Q. Well, you can get off the truck without —

A. Exactly.

Q. — claiming sexual harassment, right?

A. Exactly.

Q. Any time you want off the truck for any reason —

A. You can ask. You can ask.

Q. It's totally up to you when you get a new codriver?

A. Exactly.

Q. And what was George's response?

A. I don't know. I don't remember what he said.

[103]Q. What was his demeanor?

A. Cranky, upset, he was angry. He was angry, I think, at the response that he got from the dispatcher, but, of course, that's just my thinking. He didn't look happy any way; he didn't look like he looked at first. Like I said, he looked really concerned at first, and it went to concerned to agitated, angry, you know, something like that.

Q. You think George's response to your report was appropriate?

A. I do. I do.

Q. Okay. Then what happened?

A. We went back to the office.

Q. That was the end of the conversation with —

A. I don't remember what was said between them two after the fact, but the next thing I remember is the office. I remember being back in the office talking to the head of HR, whoever it was in HR.

Q. You don't remember how you got to HR, but you remember —

A. No, no, no, I didn't — they came to us.

Q. Where?

A. They came to the building that we were in — that George was in and the dispatchers were in, it's a building on the other side of the —

[104]Q. So HR meets you at the place where you're talking to the dispatcher?

A. HR meets me in the room that me and George were sitting in. Me and George had gone back to the room.

Q. You left your dispatcher and went back to the office?

A. Yeah.

Q. When you say HR —

A. Human resources.

Q. I understand that. Who, who?

A. I don't remember his name. It was a guy.

Q. Okay. And when what happened?

A. He asked me what had happened, and he told me to write it down.

Q. Okay.

A. I don't remember if I signed anything else, but I remember I had to write everything down that I had told — there it is, his name is Jim. I had to write everything

down that had occurred, and I don't remember if I signed anything else, but this part I remember doing.

Q. And then what?

A. They told me that it would get taken care of that they could not tell me what type of disciplinary action would be taken, but it would be taken care of. That was [105]it.

Q. And did you ever hear anything further?

A. I got a call from Jim again, and he told me he had spoken with Chuck and that it was taken care of, but he, again, couldn't tell me what action had been taken.

Q. Did he tell you whether or not Chuck admitted to or denied the allegations?

A. I don't remember. I don't remember him going into detail about the conversation that they had just that he had spoken with him, and it would be taken care of, that's about all I remember.

Q. At that point, did you feel that your complaint had been adequately addressed?

A. I did. I did.

* * * *

APPENDIX X — ORDER ON MOTION UNDER RULE 16(F) OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, FILED NOVEMBER 19, 2008

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION

No. 07-CV-95-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARK and LATESHA THOMAS,

Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC.,

Defendant.

ORDER

Appendix X

I. INTRODUCTION

The matter before the court is the "Motion Under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members" ("Motion") (docket no. 56). The court held a hearing ("Hearing") on the Motion on November 12, 2008. Attorneys Jean Kamp and Brian Tyndall represented Plaintiff Equal Employment Opportunity Commission ("the EEOC"). Attorneys Kevin Visser, Thomas Wolle, John Mathias and Robert Markowski represented Defendant CRST Van Expedited, Inc. ("CRST").[1] The Motion is fully submitted and ready for decision.

II. PROCEDURAL BACKGROUND

On November 16, 2007, the EEOC filed the First Amended Complaint (docket no. 8) against CRST. Pursuant to 42 U.S.C. § 2000e-5(f)(1), the EEOC brings suit in its own name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Ms. Monika Stark] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint at 1; *see Gen. Tele. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 324, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) (stating that § 2000e-5(f)(1) grants the EEOC "authority

1. Plaintiffs-Interveners Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Monika Stark and Latesha Thomas appeared at the Hearing through Attorneys Jeffrey Tronvold and Matthew Reilly but do not take a position on the Motion.

to bring suit in its own name for the purpose . . . of securing relief for a group of aggrieved individuals"). The EEOC alleges CRST engaged in a pattern or practice of sex discrimination against its female truck drivers, in violation of 42 U.S.C. §§ 2000e-2 and 2000e-3. Specifically, the EEOC alleges:

> 7. Since at least July 2005, CRST engaged in unlawful employment practices . . . . [T]wo of its lead drivers subjected [Ms. Stark] to sexual harassment . . . (including . . . unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. . . .
>
> 8. Other similarly situated female employees of CRST were also subjected to [similar] sexual harassment and a sexually hostile and offensive work environment while working for CRST, from their lead drivers or team drivers . . . .
>
> 9. The effect of [such] practices . . . has been to deprive [Ms. Stark] and class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

First Amended Complaint at 2-3. The EEOC alleges CRST refused to take prompt and appropriate action to prevent, correct and protect its female truck drivers from the harassment and the hostile environment. The

EEOC seeks compensatory damages, punitive damages and injunctive relief on behalf of Ms. Stark and the other similarly situated women.

On May 1, 2008, CRST filed an Amended Answer (docket no. 36). CRST denies the substance of the First Amended Complaint.

On February 8, 2008, the court entered a Scheduling Order and Discovery Plan ("Scheduling Order") (docket no. 21), pursuant to Federal Rules of Civil Procedure 16(b) and 26(f) and Local Rule 16. The parties had proposed various deadlines to the court, and the court accepted them. The court set the following deadlines: initial disclosures—February 27, 2008; motions to add parties—May 1, 2008; motions to amend pleadings—May 1, 2008; expert witnesses—August 7, 2008 (Plaintiff), October 7, 2008 (Defendant) and November 7, 2008 (Plaintiff's rebuttal); completion of discovery—December 7, 2008; dispositive motions—January 15, 2009; and trial ready—May 15, 2009. The court later scheduled a jury trial for the two-week period beginning on June 15, 2009.

On August 7, 2008, the EEOC filed a Motion to Modify Scheduling Order (docket no. 37). The EEOC asked the court to continue the "deadlines for identification and discovery of treating medical or psychological witnesses only" to November 7, 2008. Motion to Modify at 1. The EEOC indicated it was still in the process of identifying aggrieved individuals and wished to reserve the opportunity to call their treating medical or psychological witnesses at trial.

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On August 8, 2008, CRST filed a Response (docket no. 38). CRST argued:

> [U]ntil the EEOC completes the identification of women on whose behalf it seeks relief in this lawsuit . . . it is not possible to set a definite schedule for expert disclosures or for completing other fact discovery to which CRST is entitled before CRST is required to produce expert reports. At the present time, . . . CRST cannot evaluate the practicality of the EEOC's proposed schedule modifications. Likewise, CRST is not in a position to make representations to the [c]ourt regarding the feasability of other aspects of the discovery schedule, including the December 7[, 2008,] discovery cut-off date.
>
> * * *
>
> According to [the EEOC], it is still "in the process of identifying class members from, among other things, lists of drivers provided by [CRST]. Even though the EEOC proposes a deadline for the completion of expert discovery and appears to endorse the current discovery schedule in other respects, it offers no proposed end date for its identification of [allegedly aggrieved individuals]. Without knowing when this process will end, CRST cannot commit itself to dates for completing the fact and expert discovery to which it is entitled.

Response at 3. CRST suggested a deadline of September 4, 2008, "as the end date by which EEOC completes its identification of class members." *Id.* at 4.

On August 18, 2008, the EEOC filed a Reply (docket no. 42). The EEOC stated it had identified 49 aggrieved individuals after mailing thousands of letters to current and former CRST female drivers and soliciting their participation in this lawsuit. Reply at 1. The EEOC promised to identify "the bulk" of aggrieved individuals before October 15, 2008, and "expect[ed] the total class [would] reach between 100 and 150 individuals." *Id.* at 1-2. The EEOC suggested that the discovery deadline of December 7, 2008, serve as "the closing date" for identification. *Id.* at 2-3.

On August 20, 2008, Judge Scoles issued an Order Modifying Discovery Plan ("Order") (docket no. 44). Judge Scoles ruled:

> The [c]ourt concludes that a deadline for identifying class members should be established. After reviewing the parties' respective positions, the [c]ourt concludes that [the EEOC] should be required to disclose the identity of class members not later than October 15, 2008. The deadlines for disclosure of expert witnesses will be extended to November 1, 2008, December 1, 2008, and December 15, 2008, respectively.

Appendix X

> To accommodate the extensions, the [c]ourt also extends the discovery deadline to January 15, 2009, and the dispositive motions deadline to February 1, 2009. . . . .

Order at 2 (footnote omitted).

III. MERITS

A. Motion

On November 6, 2008, CRST filed the Motion. CRST contends the EEOC is attempting an end-run around the Order. Prior to the Order, the EEOC had a practice of not identifying a woman as an aggrieved individual until she affirmatively advised the EEOC that she wished to have the EEOC participate in this lawsuit on her behalf. After the Order, however, the EEOC adopted a new practice of "naming everyone and asking questions later." Brief in Support of Motion (docket no. 56-2), at 10.

On or before October 15, 2008, the EEOC "identified" a grand total of approximately 270 aggrieved individuals. (Although the EEOC actually disclosed 294 women, the EEOC admits its disclosures contain duplicates and a man.) CRST opines the EEOC's disclosures include women (1) who had not affirmatively agreed to participate in this lawsuit and (2) whom the EEOC did not have a good faith reason to believe were victims of actionable sex discrimination. CRST claims the EEOC's new practice violates the letter and spirit of the Order. CRST opines that, if allowed to stand, CRST's new practice would

render the Order largely meaningless and "promises to impose a huge and unwarranted discovery expense on CRST and an even greater burden on the limited time and resources of this [c]ourt." *Id.* at 6.

CRST asks the court to strike two categories of women from the EEOC's disclosures. First, the court should strike all women who have not given the EEOC their informed consent to assert claims against CRST on their behalf. Second, CRST asks the court to strike "any women that the EEOC, as of the October 15 deadline, was unprepared to assert—consistent with the standards imposed by [Federal] Rule [of Civil Procedure] 11—were claiming to have experienced severe or pervasive sexual harassment." *Id.* at 7 (adopting the standard for pattern-or-practice claims set forth in *EEOC v. Int'l Profit Assocs., Inc.*, No. 01-C-4427, 2007 U.S. Dist. LEXIS 78378, 2007 WL 3120069 (N.D. Ill. Oct. 23, 2007)).

B. Resistance

On November 12, 2008, the EEOC filed a Resistance (docket no. 60). The EEOC "understood the Order to require that EEOC identify all persons for whom it intends to seek relief." Resistance (docket no. 60), at 5. The EEOC maintains it complied with the Order.

The EEOC maintains CRST's argument that the court should strike all women who have not given the EEOC their informed consent is based upon a false premise that such women must "opt in" to this lawsuit as if Federal Rule of Civil Procedure 23 governed. The EEOC states:

Appendix X

> [The] EEOC identified all women whom it had then discovered who meet its definition for the class for whom it seeks relief. [The] EEOC respectfully submits that as "master of its [own] case," it has sole discretion to determine the group of persons for whom to seek relief. Of course, it acknowledges the [c]ourt's right to set the deadline for identifying those persons for discovery purposes, and CRST's right to challenge, at the appropriate time, the substantive merits of each claim. [The] EEOC also acknowledges CRST's right to seek discovery, at the appropriate time, concerning each class member, and to seek relief if [the] EEOC is unable to provide the class member for deposition. In this case, [the] EEOC has not identified the very few women who have advised it that they do not wish to be included. It has had . . . personal contact with 132 of the identified class members, each of whom has provided credible evidence that she meets the criteria for class membership. [The] EEOC does intend to seek relief for []class members[] whom it has spoken to since October 15 and those whom it has thus far been unable to speak with personally, but who have made credible complaints included in CRST's investigative files, or who have communicated to [the] EEOC that they believe they are victims of harassment.

Id. at 10 (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) (footnote omitted)).

Second, the EEOC denies CRST's allegation that the EEOC disclosed women whom the EEOC knew did not have viable claims of sex discrimination. While not conceding that CRST states the proper legal standard, the EEOC states it nonetheless had a good-faith belief that each of the approximately 270 identified aggrieved individuals suffered severe or pervasive sexual harassment.

C. Analysis

The court declines to strike all women who have not given the EEOC informed consent. The court agrees with the EEOC that Federal Rule of Civil Procedure 23 does not apply here. *See Gen Tele. Co.*, 446 U.S. at 324 ("[The EEOC's] authority . . . is in no way dependent upon Rule 23, and the Rule has no application to a § [2000e-5(f)(1)] suit."). There is no obligation for aggrieved individuals to "opt in" to the lawsuit; the EEOC may proceed on behalf of such individuals with or without their consent. The Supreme Court has stated:

> If it were true that the EEOC could prosecute its claim only with [an allegedly aggrieved individual's] consent . . . the [lower] court's analysis might be persuasive. But once a[n administrative] charge is filed, the exact opposite is true under the statute—the EEOC is in command of the process. The EEOC has exclusive jurisdiction over the claim for 180 days. During that time, the employee must obtain a right-to-sue letter from the agency before prosecuting the claim. If, however, the

> EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit. In fact, the EEOC takes the position that it may pursue a claim on the employee's behalf even after the employee has disavowed any desire to seek relief. The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. [I]t is the [EEOC's] province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief. And if the [EEOC] makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum.

Waffle House, 534 U.S. at 291-92 (citations omitted).

The court also declines to strike any other women from the EEOC's disclosure lists for any purported failure to comply with Rule 11. The EEOC represents to the court that, as of October 15, 2008, it had a good-faith belief that each and every one of the approximately 270 women disclosed to CRST has an actionable claim for sex discrimination. Further, the EEOC represents to the court that none of these women have advised the EEOC that they do not want the EEOC to pursue claims on their behalf. The court will take the EEOC's representations to the court at face value. The court takes the EEOC's representations at face value, because the court presumptively trusts members of the bar appearing

in this court to tell the truth. Further, the court does not know, with any particularity, the underlying facts and circumstances that led the EEOC to disclose each allegedly aggrieved individual to CRST. If during the course of discovery CRST discovers evidence that sheds doubt on the EEOC's representations to the court, CRST may file an appropriate motion.

Although the EEOC is "the master of its own case," the court retains inherent case management authority. Fed. R. Civ. P. 26(f); Fed. R. Civ. P. 16(b); LR 16. The court remains concerned that, absent further orders from the court, CRST might unfairly face a "moving target" of prospective plaintiffs as discovery winds down and trial approaches.

To forestall any prejudice to CRST, the court shall adopt the following three rules. First, the EEOC shall immediately file with the court a corrected list of the approximately 270 women it disclosed as of October 15, 2008. Second, the EEOC shall make all women on the list available to CRST for a deposition before the conclusion of discovery on January 15, 2008. If the EEOC fails to make a woman available, as a discovery sanction the court will not permit her to testify at trial and will bar the EEOC from seeking relief on her behalf in this case. Third, as soon as the EEOC learns that it no longer wishes to pursue individual claims on behalf of any of the women on the list, it must immediately inform CRST and file an amended disclosure list with the court.

Appendix X

Although the EEOC arguably did not comply with the spirit of the Order—the obvious purpose of the Order was to pin down the allegedly aggrieved individuals in this case as soon as possible—the court can discern little prejudice to CRST so long as these three rules are in place. CRST retains its right to conduct discovery of all persons who will pursue claims against it at trial.

The court recognizes that expert witness reports will be due before the close of discovery. CRST maintains that it will suffer prejudice, because its experts will not know when they write their reports whether this is truly a 270-person pattern-or-practice case. The court agrees that the number of aggrieved individuals seeking relief in this case is relevant to the merits. *See, e.g., EEOC v. Dial Corp.*, 469 F.3d 735, 741 (8th Cir. 2006) (requiring plaintiffs to prove "'regular and purposeful' discrimination" and "show that more than an isolated act of discrimination occurred and that 'discrimination was the company's standard operating procedure") (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339, 360, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). Consistent with the EEOC's representations to the court, CRST may assume with some certainty that this is approximately a 270-person pattern-or-practice case. Should the EEOC's representations to the court turn out to be false, CRST may file an appropriate motion for sanctions and permission to file a supplemental or substituted expert report.

Appendix X

IV. OTHER ISSUES

The parties raised two other issues at the Hearing. The court discusses each issue, in turn.

A. Attorney-Client Privilege

In the Motion, CRST claims the EEOC is impermissibly asserting an attorney-client privilege with all of the approximately 270 aggrieved individuals, even though it does not have a consensual attorney-client relationship with the vast majority of them. CRST wants to talk with some of these women outside of the confines of a deposition to find out whether they might possess evidence beneficial to CRST's defense. The EEOC concedes it does not have an attorney-client relationship with such women but nonetheless asks the court to order CRST to refrain from speaking with them "about the subject matter of individual complaints of sex harassment." *Id.* at 12. At the Hearing, the EEOC expressed a concern about "the possibilities of intimidation."

The court holds that CRST may talk with all women with whom the EEOC does not have a consensual attorney-client relationship and may do so about any subject. The EEOC's proffered restriction on CRST's ability to contact these women is overbroad based on the record presently before the court. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981) ("[A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a

limitation and the potential interference with the rights of the parties."). There is no evidence to substantiate the EEOC's amorphous concern about intimidation. The court takes counsel for CRST at their word when they represent to the court that they will not engage in improper intimidation.

Within ten days, the EEOC shall file a list of all women with whom it claims an attorney-client relationship.

B. Bifurcation

In its Resistance and at the Hearing, the EEOC repeatedly expressed its position that the court should bifurcate trial into at least two phases. According to the EEOC, one jury would decide whether CRST engaged in a pattern or practice of sex discrimination. Only later would the parties conduct discovery as to the individual plaintiffs' damages and submit their claims to other juries and possibly a special master for final judgment. CRST insists that a single, unified proceeding is more manageable and points out that another case in which the EEOC's method of bifurcation was adopted is about to enter its eighth year.

The court has not agreed to bifurcation. Further, the parties did not agree to bifurcation of discovery and trial in the Scheduling Order. There is no written motion before the court on bifurcation or modification of the Scheduling Order and thus nothing upon which the court may rule. Therefore the parties should proceed with the assumption that the discovery deadline applies to the issues of liability as well as individual damages.

IT IS SO ORDERED.

DATED this 19th day of November, 2008.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX Y — EXCERPTS OF DEPOSITION OF KELLI CARNEY, TAKEN NOVEMBER 13, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-CV-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiffs,

VS.

CRST VAN EXPEDITED, INC.,

Defendant.

DEPONENT: KELLI CARNEY

DATE: Thursday, November 13, 2008

TIME: 10:01 a.m.

LOCATION: 477 Michigan Avenue

Detroit, Michigan

REPORTER: Karen Fortna, RMR, RPR, CSR-5067

VIDEO: Andrew Winston

Appendix Y

* * *

[17]Q. And in between Habitat for Humanity and CRST is when you went to American Driving?

A. Yes.

Q. And did you pay your own tuition for the American Driving?

A. No.

Q. Did CRST pay your tuition?

A. Yes.

Q. And was that part of a contract that you had at CRST?

A. Yes.

Q. And did that contract obligate you to work for CRST for a certain length of time?

A. Yes.

Q. Do you know what length of time?

A. Six months.

Q. And what were the dates, do you recall, that you worked for CRST?

A. I believe it was October — no, I'm sorry, September of '04 — the first time I quit in April of '05, I believe, and I went back to them in June [18]of '05, I believe, and I only worked there for a couple of weeks.

* * *

[55]Q. Okay. Am I correct that you do allege that you were subjected to sexual harassment while you worked at CRST?

A. Yes.

Q. Who do you allege sexually harassed you?

A. Joe McCarthy, Raymond Coplan. And I forget the other guy's name. I believe it was Chris. I would have to look at my log books. Chris Evans, I believe it was.

Q. Okay. So starting with Joe McCarthy, what did Joe McCarthy do that you considered sexual harassment?

A. He promised me that if I did sexual favors for him that he would — he would pay for everything that was accrued on the road, like all my meals, my clothing, and that he would pass me.

Q. How soon after you got on the truck did he make that promise?

A. I would say probably two to three days.

Q. Was that the first thing he did that you considered sexual harassment?

A. Yes.

(Discussion off the record.)

Q. (By Mr. Hirth): And did you make it clear to him that you were not interested in that kind of [56]arrangement?

A. No.

Q, No, you did not make it clear to him?

A. No.

Q. How did you respond to his offer?

A. At first I was leary of it, and I ended up giving in because of the amount of money I was making. I was 23 years old and naive.

Q. And when you say you gave in, do you mean you had sexual relationships with Mr. McCarthy?

A. Yes.

Q. And how long into your training with him did those relations begin?

A. Almost immediately. We — he took me to Boston my first week on the truck. I didn't even drive. He took me to his hometown in Boston and he took me to his house and he told me that I had to sleep in his bed with him because his daughter was in his other bed.

Q. And did you have sex with him on that occasion?

A. Not at that time. He — at first he was very nice, he just held me, and it progressively got worse. He started kissing on my neck and putting his hands down my pants.

Q. When was the first time that he kissed you?

[57]A. I believe it was the second night, I'm not sure.

Q. The second night?

A. In Boston.

Q. In Boston.

How many nights were you in Boston?

A. A week, I believe.

Q. And was that like home time?

A. For him.

Q. For him?

A. Yes.

Q. Okay. But it was not considered home time for you?

A. No.

Q. Okay. So did you do any training during that week?

A. No.

Q. Okay. So — and I assume that you weren't paid during that week?

A. Yes, I was.

Q. You were paid. Okay.

So was your payment for training based on days as opposed to miles?

A. I believe so because he was an owner-operator.

Q. Okay. So were you paid by him as opposed to by CRST or were you paid by CRST?

A. I believe l was paid by CRST through him, but I'm not exactly sure how that worked.

[58]Q. Okay. So he owned his own truck?

A. Yes.

Q. Okay. So the second night in Boston, he kissed you. Did anything else happen the second night of a sexual nature?

A. Yes. He tried putting his hands down my pants.

Q. And did you say anything to him at the time?

A. Not verbally, no.

Q. Did you indicate anything to him at the time?

A. I tried to take his hands out of my pants.

Q. And so that was the third night — I'm sorry, the second night.

On the third night in Boston, what happened on the third night?

A. He was more forceful, I believe.

Q. And did you have sex with him on the third night?

A. Yes, I believe so.

Q. Did you resist his sexual offer or sexual advances?

A. Not very much, but a little bit.

Q. Did you try to make him aware that you were uncomfortable with the situation?

A. Yes.

Q. How did you do that?

A. I told him I didn't feel right.

Q. Didn't feel right in terms of didn't feel healthy [59]or didn't feel right having sex with him?

A. Didn't feel right having sex with him.

Q. But you did have sex with him that night, correct?

A. Yes.

Q. Okay. And for the — you said you were in Boston about a week, so three or four more nights?

A. Uh-hum.

Q. And did you continue to have sex with him on those subsequent nights?

A. Yes.

Q. What did you do during the day during that time?

A. He took me around to different places in Boston, took me on train rides.

Q. Sort of like touring the city?

A. Yeah.

Q. Did you go out to dinner, things like that?

A. Yes.

Q. Okay. After his home time was done and you got back on the truck, did you continue to have sexual relations with him on the truck?

A. Yes.

Q. Do you recall when this was that you were in Boston, the dates?

A. I don't recall. It was my very first week of training.

[60]Q. Okay. Do you recall if it was in October?

A. I believe so.

Q. Okay. So you headed back out on the road to continue your training for the second week, and during that second week, how many times would you say you had sex with him?

A. I believe it was every day he would ask me for either sex or blow jobs.

Q. And you did both?

A. Yes.

Q. And did that continue into the third week of training also?

A. Yes.

Q. And the fourth week?

A. Yes.

Q. So is it fair to say that it happened basically daily the entire time that you were training?

A. Yes.

Q. Okay. After the initial resistance that — when you took his hands out of your pants and made it clear to him that — or told him that you didn't feel right, did you make further attempts to tell him that you were uncomfortable with the situation?

A. No, because he promised me that I would — if I did what he wanted me to, that I would make a lot of [61]money driving.

Q. Okay. And did you report Mr. McCarthy's conduct to anyone at CRST?

A. Yes.

Q. Who did you report it to?

A. Sue and his dispatcher.

Q. Sue Ayers?

A. Yes.

Q. I think her name may be — it was Sue Ayers at the time?

A. Yes.

Q. And to his dispatcher?

A. Yes.

Q. And do you recall his dispatcher's name?

A. I don't.

Q. Do you recall how long into your training the first time you — how many days into your training you called Sue Ayers for the first time?

A. I told Sue after the training was done.

Q. After the training was done. Okay.

So after you got off the truck?

A. Yes.

Q. And the same for Mr. McCarthy's dispatcher, you told him after you got off?

A. Yes, I told him at the same time.

* * *

[64]Q. And when you spoke to the dispatchers, what did you tell them happened?

A. I told Sue that Joe offered me money for sexual favors and that I didn't have to drive very much because I was doing this for him.

Q. Did you tell her anything else?

A. That he was probably doing it to his new trainee, also.

Q. How did — are you aware of any action that Sue took in response to what you said?

A. I don't believe she took any action.

Q. Did you ask for any particular result? Did you ask that he be fired or disciplined or did you just report what happened?

[65]A. I just reported it.

Q. Okay. And the other dispatcher?

A. He didn't want anything to do with it.

Q. Okay. So when you told him about it, did he — how did he make you aware that he didn't want anything to do with it?

A. He said, "I'm not your dispatcher. You need to go talk to your dispatcher."

Q. Okay. Did Sue tell you to talk to human resources?

A. No. She said that she would speak with her boss.

Q. And then did you get on another truck at Cedar Rapids and continue driving?

A. I believe so, yes.

Q. Do you remember who your next — I guess it would have been a co-driver at this point?

A. Yes. I believe it was Chris Evans.

Q. And how did you come to drive with Mr. Evans; did you meet him before or was he — just assigned to his truck?

A. He was just assigned.

Q. Okay. Was he an owner-operator as well?

A. No.

Q. So were you assigned to the truck that he was on or were you both assigned to a truck together?

A. I believe I already had a truck and he was assigned [66]to my truck.

Q. He was assigned to yours. Okay.

And how long did you drive with Mr. Evans?

A. I believe it was only a couple of weeks.

Q. And did Mr. Evans sexually harass you?

A. Yes.

Q. What did he do?

A. He would try to rub my shoulders while I was driving and I told him to keep his hands off of me. He would also ask me why I wouldn't be with an older man like him and I told him he was old enough to be my father.

Q. Did he do anything else?

A. He just continually tried to rub my shoulders while I was driving and I kept telling him not to touch me.

Q. Did he touch any part of you other than your shoulders?

A. I don't believe so.

Q. Did he ever directly ask for sex?

A. I don't believe so.

Q. Did he ever offer you money for sex?

A. No.

Q. Did you report Mr. Evans' conduct to anyone at CRST?

[67]A. Yes.

Q. Who did you report it to?

A. Sue.

Q. And when did you report it?

A. Immediately.

Q. While you were still in the truck with him?

A. Yes.

Q. How long — when you got on the truck with Mr. Evans, how long was it until the first time that he did something that you considered sexual harassment?

A. Probably a week.

Q. So the first week he didn't do anything?

A. No.

Q. Okay. And so the first time he did something that second week, that's when you contacted Sue?

A. Yes.

Q. Do you — did you contact her by Qualcomm?

A. I believe it was Qualcomm, might have been my cell phone, I don't remember.

Q. And what did you tell her?

A. I told her that I needed a new co-driver because he wouldn't quit trying to touch me.

Q. And you said you only drove with him for a couple of weeks, and this started in the second week, so [68]you were with him then for about a week that this was happening?

A. Yes. We were driving back from California.

Q. Okay. And where did you get off the truck with — or did he get off your truck, I guess?

A. I ended up packing up my stuff off my truck and going into the truck stop at Carlisle, Pennsylvania.

Q. When you asked Sue for a new co-driver and you told her why you wanted a new co-driver, how did she respond?

A. She asked me if I could stick it out a little bit longer.

Q. And what did you say?

A. I said no.

Q. And did she respond to that?

A. No. I believe we got off the phone after that and I immediately took all my stuff off the truck. I took my CB out, I packed everything into trash bags and got off the truck before he came back out.

Q. That was in Carlisle?

A. Yes.

Q. So you — this is when you talked — you talked to her when you were in Carlisle?

A. Yes.

[69]Q. Okay. And that was at the end of the second week?

A. I believe so, yes.

Q. Did you talk to her before that?

A. I believe so, when we were in California when it first started. I could be wrong, though. It was four years ago.

Q. And do you recall if she responded or how she responded?

A. I don't recall that, no.

Q. Is it possible that you didn't contact her until you got to Carlisle?

A. It is possible, but not likely because I was pretty on top of it with him.

Q. Did you pass any other — or go through any other CRST terminals on the way back from California?

A. No.

Q. Did you start out from a CRST terminal in California?

A. I believe so.

Q. Fontana?

A. Yes.

Q. Okay. And had Mr. Evans already begun the conduct that you found objectionable before you got to Fontana?

A. I believe he tried to rub my shoulders once before [70]that and I told him not to touch me and he didn't. He quit.

Q. And then started again after you got back on the road?

A. Yes.

Q. Okay. So when you were in Fontana, you didn't believe that you needed to get off the truck at that point?

A. Correct.

Q. Okay. Between Fontana and Carlisle, did you contact Sue Ayers?

A. No.

Q. Okay.

A. I don't believe so.

Q. Did you contact anyone else at CRST?

A. Not at CRST, no.

Q. Did you contact — so you didn't call HR?

A. No.

Q. Did you tell anyone else?

A. My family.

Q. Mother, father, sister again?

A. Yes. Those are the only people I had to talk to.

Q. And you talked to them by phone?

A. Yes.

Q. So you had your cell phone with you on the truck?

[71]A. Yes.

Q. Okay. And you knew how to use the Qualcomm?

A. Yes.

Q. Okay. So you got to Carlisle, you talked to Sue, she asked you to stick it out, you got off the truck?

A. Yes.

Q. And then did you — were you paired with another driver after that?

A. I don't believe so. I think that's when I started driving by myself for a little while.

Q. For CRST?

A. Yes, which is actually against the law.

Q. Did they ask you to drive solo?

A. Yes.

Q. Did you ask for a co-driver?

A. Yes. I asked for a female co-driver.

Q. Did you eventually get a co-driver?

A. Yes.

Q. And who was that?

A. Ray Coplan. Sue told me there was no females available.

Q. How long did you drive by yourself before you were paired up with Ray Coplan?

A. I am not sure. I think it was a week.

[72]Q. And then how long were you on the truck with Mr. Coplan?

A. A month.

Q. And I believe you testified earlier that you believe Mr. Coplan also sexually harassed you?

A. Yes, he did.

Q. What did he do?

A. I'm sorry. Ray Coplan threatened my life. He — when he first got on the truck, I didn't think anything of

it. He looked at me and said, "'Watch, I'm going to fuck you." And I thought he was joking.

Q. That was the first day you got on the truck?

A. First day he got on the truck. I picked him up in Ohio.

Q. Okay. What else did he do?

A. I believe I drove that first day and he didn't do anything, and when we stopped to take a break, he insisted that I sleep in the same bed with him. I tried to sleep on the top bunk and he told me that if I didn't sleep on the bottom bunk with him, he would leave me on the side of the road.

Q. And that was the second night or first night?

A. I believe that was the second night.

Q. Second night. Okay.

[73]And did you have sex with him that night?

A. I don't believe it was that night. He made me sleep in bed with him and I think it was the very next night that he held me down, he was on top of me, and he forced sex upon me.

Q. Was that the only time he did that or did he do —

A. No.

Q. — it again?

A. He did that multiple times.

Q. Was it a daily occurrence?

A. Yes.

Q. And you said you were on the truck with him for about a month?

A. Yes.

Q. Okay. So this went on for quite some time?

A. Yes.

Q. Did he do anything else that you considered to be sexual harassment?

A. Like what? There's nothing more that he could have done.

Q. Did he make other comments?

A. No, other than threatening my life a few times.

Q. How did he threaten your life?

A. I told him that I was going to tell CRST and I was going to just stay in the truck stop and he told me [74]that he would kill me if I did.

Q. How long into your teaming with him did that — did he first threaten you?

A. It was the first week.

Q. And did you attempt to get off the truck at other times?

A. Yes. I tried to sell Sue about it over the Qualcomm and he just kept watching over everything I did. I couldn't even make a phone call without him being right there.

Q. So were you able to say what had happened on the Qualcomm?

A. No. I just told her I needed to get off the truck.

Q. Did you — were you able to call her? You said he was around.

A. I wasn't able to call her because he was always right there.

Q. Were you able to call anyone else?

A. No.

Q. Were you able to call your family?

A. No.

Q. Did you get a response from Sue when you asked to get off the truck by the Qualcomm?

A. Yes.

Q. What did she say?

[75]A. I believe she asked me why and I couldn't tell her at that time because he was right there.

Q. When did you eventually get off the truck?

A. He actually had to go home for a family emergency, thankfully.

Q. Do you recall where you were when that happened?

A. I believe we were in Ohio.

Q. So did he get off the truck and you stayed on the truck?

A. Yes.

Q. Okay. And what did you do immediately after he got off the truck?

A. I drove by myself for awhile.

Q. Do you remember where you drove?

Appendix Y

A. I believe I drove back to Louisa, Kentucky, to the driving academy.

Q. After he got off the truck, did you call Sue again to tell her what had happened?

A. No. I waited until I was able to get back to Cedar Rapids, Iowa, and I believe I spoke with the HR. That was one of the head people that I spoke with.

Q. You don't recall if it was a man or a woman?

A. It was a man.

Q. Does Jim Barnes sound like the right name or Bob Freeman?

[76]A. They sound familiar, but I couldn't tell you.

Q. It's a long time ago.

So did you talk to Sue first and then go to HR, or did you go directly to HR?

A. No, I went directly to HR.

Q. And what did you tell HR had happened?

A. I told them that Ray had held me down and forced me to have sex with him and that he had threatened my life and I was scared to death of him.

* * * *

APPENDIX Z — EEOC MEMORANDUM IN OPPOSITION TO CRST'S MOTION FOR AN ORDER TO SHOW CAUSE, IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, FILED NOVEMBER 12, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-00095-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

JANET BOOT, BARBARA GRANT, CINDY MOFFETT, REMCEY JEUNENNE PEEPLES, MONIKA STARK, and LATESHA THOMAS,

Plaintiff-Interveners,

v.

CRST VAN EXPEDITED, INC.,

Defendant.

EEOC MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 16(f) FOR AN ORDER TO SHOW CAUSE CONCERNING THE EEOC'S IDENTIFICATION OF CLASS MEMBERS

Appendix Z

CRST Van Expedited, Inc. ("CRST") has requested the Court to sanction plaintiff, the Equal Employment Opportunity Commission ("EEOC"), for failure to comply with the Court's discovery Order of August 20, 2008, requiring EEOC to identify class members by October 15, 2008. EEOC has, in fact, fully complied with that Order, and the motion should be denied.

By October 15, 2008, EEOC identified 268 class members. Despite this obvious compliance with the Court's Order, CRST challenges the inclusion of three groups of class members: those whom it speculates that EEOC did not have sufficient factual basis for including in the class; those who did not formally consent to class membership; and those who do not meet the standard of severe and pervasive harassment required in a pattern or practice case, as defined by Judge Joan Gottschall in *EEOC v. International Profit Associates, Inc.*, 2007 WL 3120069 (N.D. Ill., 10-23-07)("IPA II").[1]

CRST's speculation that EEOC's selection of class members was based on insufficient evidence is simply

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1. CRST relies on the *IPA* case, *EEOC v. International Profit Associates, Inc.*, N. D. Ill. #01 C 4427, a pattern or practice sexual harassment case presently being litigated by some of the same EEOC counsel litigating this case, and pending in the Northern District of Illinois. Judge Joan Gottschall has to date issued three written decisions in response to Defendant's Motions for Summary Judgment; the decision relied upon by CRST is the second such decision, and is therefore cited as *IPA II*. The first decision is found at 2007 WL 844555 (N.D. Ill. 3-16-07) (*IPA I*); the third ("*IPA III*"), dated July 14, 2008, is attached as Exhibit 1.

false. Each class member named by the EEOC in its Initial Disclosures and First through Tenth Supplements thereto has provided credible evidence of sexual harassment, either to the EEOC directly, or to CRST. The exception, discussed below, are 56 women, listed in EEOC's Eleventh Supplement to Initial Disclosures, who responded to EEOC's correspondence prior to the October 15 deadline, but whom EEOC was unable to make contact with prior to October 15.

The remaining two arguments are related to the issues which EEOC desired to raise with the Court, when it filed its Motion for a Rule 16 Pretrial Conference, and are discussed in Section III, below.

I. Background

This is a pattern or practice case in which EEOC alleges that CRST subjected its female truck drivers to a hostile work environment based on sex. CRST is a national over the road trucking firm, whose business model relies on drivers working in pairs in order to deliver freight more quickly than its competitors. CRST recruits thousands of new drivers, many of whom have no previous truck driving experience. For many, it pays for the applicant to attend school to obtain a commercial driver's license, in return for a commitment to work for CRST for a period of six to eight months. Following successful completion of the schooling, new drivers are placed with lead drivers for a period of 28 days, during which the lead driver trains the student, and has complete authority over the way the driving is conducted and whether the student successfully

completes the training period. Following completion of training, drivers are paired on trucks, often with complete strangers.

While driving together the paired drivers are alone with each other, first for the 28 days, and later as they transport loads of freight across the country. They share a tiny berth behind the seats of the truck, which includes a bunk bed, and room for small items such as a television and a microwave. They generally take turns sleeping while the other drives, and leave the truck only to obtain fuel or food, or for bathroom and shower breaks. The potential for sexual harassment is obvious.

While CRST has written policies prohibiting sexual harassment, its actual policies, challenged in this lawsuit, are completely insufficient to prevent harassment, to protect victims while the harassment is occurring, to discipline harassers, or to prevent known harassers from repeating their conduct. Women who advise their dispatcher that they are being harassed are routinely told to stay on the truck rather than interrupt their training or delay delivery of the load. When they are permitted to leave the truck, they are often told to wait until they reach a CRST terminal, or, if they insist on leaving immediately, are often not provided with adequate money or transportation to reach safety. When formal complaints are made, victims are routinely told that CRST is unable to determine whether the allegations are well founded, because there were no witnesses on the truck. If a woman leaves CRST because of harassment, she faces being sued for the price of her schooling. In the approximately 146

sexual harassment investigation files produced to EEOC for the period from 2005-2008, virtually none resulted in the termination of the harasser. Occasionally, the Human Resources department advises the Safety department that a harasser should not be permitted to train or drive with women for a period of six months. Despite the 146 documented complaints of harassment, and numerous other complaints which did not result in an investigation, CRST witnesses have stated that the company does not have a sexual harassment problem.

But it does. EEOC has identified 268 women who were harassed, and certainly there is no reason to think that these are all. The harassment ranges from forcing women who are alone with a harasser on a truck to watch pornography and to witness nudity and masturbation; to subjecting them to propositions for sex, often coupled with threats to trainees that they will not pass the training if they refuse; to physical groping and sexual assaults, often while driving at high speeds, and to rape.

II. The Class

a. "Class Members" in EEOC Pattern or Practice Cases

The term "class" is something of a misnomer when used in a pattern or practice case brought by the EEOC. *See, EEOC v. International Profit Associates, Inc.*, 2007 WL 844555, *1-2, n. 2 (N.D. Ill. 2007)("*IPA I*"), *citing EEOC v. Mitsubishi Motor Manufacturing Co.*, 990 F. Supp. 1059, 1076, n. 10 (C.D. Ill. 1998) and *EEOC v. Dial*

Corp., 156 F. Supp. 2d 926, 946, n. 12 (N.D. Ill. 2001). The term is normally used in the context of actions brought pursuant to Rule 23 of the Federal Rules of Civil Procedure. That Rule does not apply to pattern or practice actions brought by the EEOC. *Gen. Tel. Co. of the N. W., Inc. v. EEOC*, 446 U.S. 318, 324 (1980).

In a class action brought by a private party pursuant to Rule 23(b)(3), the plaintiff is required to meet certain criteria for defining the class. Rule 23(a). There is no such requirement for an EEOC pattern or practice case. Here EEOC pled generally that CRST discriminated against "female employees of CRST [who] were [...] subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers." First Amended Complaint, ¶ 8. In practice, EEOC has included "class members" in this action who are females employed by CRST as truck drivers, and were harassed by drivers with whom they were assigned. EEOC has not included women employed by CRST in other capacities, nor female truck drivers who claim harassment by management personnel or by customers.

The second major distinction between a class action brought pursuant to Rule 23(b)(3) and the instant case is that under Rule 23(b)(3), the court may direct appropriate notice to the class which will advise the class member of her right to opt out of the class, and that she will be bound by the results of the action. There is no obligation for a

class member to "opt in" to the class; they are included even if they have no actual knowledge of the case, so long as they do not opt out. In a pattern or practice case there are no formal requirements for notice to the "class," and individuals who do not sign a release in return for monetary relief are not bound by the judgment. As discussed below, as in a Rule 23(b)(3) action, there is also no requirement that victims "opt in" in order to obtain relief.

Here the Court ordered EEOC to identify "class members" by October 15, 2008. EEOC does not understand this to mean that EEOC must identify all women who meet the criteria used by it in determining class membership, which it obviously could not do, since many may never be known. Rather EEOC has understood the Order to require that EEOC identify all persons for whom it intends to seek relief, and it has done so.

b. EEOC's Efforts to Identify "Class Members"

EEOC has identified 268[2] female truck drivers who were sexually harassed by trainers or co-drivers. The handful of women who have advised EEOC that they do not wish to be included in the class have not been included.

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2. As noted by CRST, the list of class members included thirteen duplicates and one male. CRST correctly surmises that these errors were the result of haste; they also resulted from the need to compare results from three different sources of information provided by CRST, and the movement of individuals from lists of persons to be contacted to lists of those actually contacted.

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CRST is correct that EEOC after the litigation began and discovery commenced, identified class members from three primary sources. The first group were women who responded to letters sent by EEOC in April, 2008, using language negotiated with CRST, to women drivers who had driven with males from January 1, 2005 through September, 2007. CRST had previously sent letters to these women, a copy of which is attached as Exhibit 2. The second group were women who were sent letters by EEOC on September 23, 2008, following CRST's production of updated data showing driver pairs on September 15, 2008. The third group were women identified from the approximately 146 investigative files maintained by CRST's human resources department and produced by CRST on October 1, 2008.[3]

CRST is also correct that EEOC opposed the October 15 deadline for disclosure of class members, arguing that it would be overly burdensome. At that time EEOC had sent letters to the first group, but had not yet contacted a large proportion of the women who had responded. Following receipt of the Order, EEOC directed massively increased resources to the case, and by October 15 had spoken with, and identified, a total of 132 victims of sexual harassment. Other than those class members identified in its Seventh, Ninth and Eleventh Supplemental Rule 26(a) disclosures, EEOC had spoken with every class member

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3. EEOC also identified some class members from charges filed with EEOC or state fair employment agencies, including eight charges filed since this action was brought, four of them in 2008. Including these charging parties as class members avoids the possibility of duplicate litigation.

prior to October 15. CRST's argument that class members should be stricken because EEOC was able to increase its pace of disclosure, as required by the Court, is ludicrous.

On August 15, 2006, following receipt of CRST's motion to set a deadline for identifying class members, EEOC served discovery requests on CRST asking for information concerning the second and third groups of class members: an update of the driver pair list, and investigative files which CRST might possess. When the October 15 deadline was established, EEOC requested that CRST provide the information as quickly as possible so that the deadline could be met. CRST produced the updated driver pair list on September 15 and the investigative files on October 1.

It is particularly inappropriate for CRST to argue that the disclosures based on information received from CRST on September 15 and October 1 were untimely, when both the updated driver pair list and the investigative files should have been produced, pursuant to Rule 26(a)(1), far earlier than they actually were. Initial disclosures, served on February 27, 2008, included "documents relating to female and male driver team pairings since January 1, 2005." *Exhibit 3.* CRST did not update the list as required by the Rule until September 15, thirty days after requested by EEOC. Equally egregiously, CRST's Rule 26(a)(1) disclosures did not even mention the investigative files. CRST's Amended Answer and Affirmative Defenses includes as its first affirmative defense: "CRST took reasonable care to prevent and correct unlawful harassment..." It was not until November

10, 2008, after the filing of the instant Motion, that CRST submitted a "Second Supplement to rule 26(a)(1) Initial Disclosures," which for the first time mentioned documents relating to, *inter alia*, "any complaints, any investigations by CRST into their complaints, and any corrective action taken..." p. 19, ¶ B.4. *Exhibit 4*. The files were not produced on February 27; they were not produced when explicitly requested on August 15; they were not produced on September 15, thirty days after the formal request; EEOC did not receive them until October 1, two weeks before the deadline.

As noted by CRST, the short time frames forced EEOC to request potential class members to respond within three days of receipt of EEOC's letter. While many did so, many calls came too late for EEOC to have personal contact with the potential class members prior to October 15. Based on the fact that they, and some from the earlier mailing, had responded to EEOC's letter, EEOC has a good faith belief that they were likely victims of sexual harassment, and therefore identified the 56 women who had contacted EEOC by mail or telephone, but EEOC had not been able to reach. It should be noted that many of the class members are still truck drivers and are away from home for substantial periods of time.

The third group of class members were identified through CRST's internal investigative files.[4] EEOC had not, by October 15, been able to reach those women

4. Contrary to CRST's implication, not all of the women whose complaints were investigated internally by CRST were named as class members by EEOC.

named in its Seventh and Ninth Supplemental disclosures, but instead based the class designation on the evidence contained in the investigative files.

Since October 15, EEOC has been in contacted by twelve of the women listed in its Seventh and Ninth Supplements. For example, Victoria High was identified in the Ninth Supplement, based on a complaint she made to CRST. According to the one page investigative file:

> She said that on May 3 [2005] during the night, her and Ronald Itson got on a truck together. That night, he took out two dildos and told her if she could go down on them, he'd give her $100... He asked her if he could suck her toes.... When she was driving the next day, he told her to look back into the sleeper berth. She saw that he was watching pornographic videos. He told her not to call him for any reason because he was concentrating in the back. She said the entire time she was driving, he was "getting off." He called her at the hotel yesterday to ask her why she had gotten off the truck... She was scared to go in the back because she did not want him to attack her.

Exhibit 5. Ms. High did not receive the initial letter sent by EEOC, but did receive the letter sent to women who had made sex harassment complaints, after those complaints were received on October 1. She called EEOC on October 22; the call was returned on November 7. She is currently scheduled for deposition on November 14 at 9:00 a.m.

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EEOC has, as of October 15, 2008, identified the individuals for whom it seeks relief. It has a good faith basis, as set forth above, for believing that each individual named is a victim of the pattern or practice of sex harassment alleged in the complaint, or that they desire to discuss their situation with EEOC.

III. No "Class Members" Should be Stricken

In its Motion, CRST seeks to strike class members "who have not agreed that the EEOC may assert claims on their behalf" and women who "do not have valid stand-alone claims." Def. Motion, p. 2. Neither argument has merit.

A. There is No Requirement that EEOC Obtain Consent of "Class" Members

By its Motion, CRST attempts to impose an additional requirement for class membership: that the victim of sex harassment formally opt in to the class. As discussed above, such a requirement would, of course, be far more onerous than the requirements for class members under Rule 23(b)(3), who are included in the class with or without their knowledge unless they formally opt out. CRST cites no authority for such a requirement, and, indeed, the authority is to the contrary. *See, EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536-37 (2nd Cir. 1996)(In ADEA case, EEOC is authorized "to bring suit on behalf of individuals who do not believe themselves to be victims of discrimination and who seem to have not interest in pursing a suit against their employer.") *See also, EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002), which

accepted EEOC's "position that it may pursue a claim on the employee's behalf even after the employee has disavowed any desire to seek relief [Citation omitted], the statute clearly makes the EEOC the master of its own case..."

In response to the Court's Order requiring identification of "class members" by October 15, EEOC identified all women whom it had then discovered who meet its definition for the class for whom it seeks relief. EEOC respectfully submits that as "master of its case," it has sole discretion to determine the group of persons for whom to seek relief. Of course, it acknowledges the Court's right to set the deadline for identifying those persons for discovery purposes, and CRST's right to challenge, at the appropriate time, the substantive merits of each claim. EEOC also acknowledges CRST's right to seek discovery, at the appropriate time, concerning each class member, and to seek relief if EEOC is unable to provide the class member for deposition. In this case, EEOC has not identified the very few women who have advised it that they do not wish to be included. It has had (by October 15) personal contact with 132 of the identified class members, each of whom has provided credible evidence that she meets the criteria for class membership. EEOC does intend to seek relief for "class members" whom it has spoken to since October 15 and those whom it has thus far been unable to speak with personally, but who have made credible complaints included in CRST's investigative files, or who have communicated to EEOC that they believe they are victims of harassment.[5]

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5. EEOC has been contacted since October 15 by approximately ten women making late responses to the two mass

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B. The Appropriate Standard of Proof of Individual Harassment

CRST also asks the Court to order EEOC to strike all identified class members who were not subject to conduct which was "severe or pervasive enough to render the plaintiff's work environment both objectively and subjectively hostile." Def. Mem., p. 10. The short answer is that EEOC expects to prove that every identified class member met that standard.

EEOC submits, however, that this is not the appropriate time to resolve what are, in effect, motions for summary judgment against individual claims. As discussed below, EEOC believes that individual claims should be considered after trial of the pattern or practice claim in Phase I of this case – the reason that EEOC filed its Motion for a Rule 16 Pretrial Conference. The proper standard for evaluating individual claims of harassment has not been resolved. Judge Gottschall, in requiring proof of severe and egregious harassment for each claimant, notes her disagreement with three other district courts which have considered the issue. *IPA II*, * 5-8. *See, Mitsubishi*, 990 F. Supp 1076-77; *Dial*, 156 F. Supp. 2d 946-958; *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993). Judge Gottschall has further explained in *IPA III, Exhibit 3, p. 5*, "The court's October 23rd order establishes that each claimant bears the

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mailings, who have not been identified. Following review of the individual circumstances, EEOC intends to move the Court to modify its Order to permit inclusion of some of these individuals for "good cause."

burden of individually establishing that she was subject to sexual harassment under both the objective and subjective standards recited above. However, that does not mean that the court, when examining the nature and severity of the harassment claims of each claimant in Phase II, must turn a blind eye to the findings of Phase I concerning the existence of pervasive and severe hostile environment."

As discussed below, EEOC has a proposal for the timing of addressing the substantive legal issues posed by this case. However, EEOC submits that every identified class member, subject to possible amendment for those not yet re-contacted, will meet the standard for objective and subjective harassment as defined by Judge Gottschall in *IPA*. Every woman identified was subjected to unwelcome verbal and physical conduct of a sexual nature in an atmosphere which was, by its nature, threatening and intimidating. The harassment occurred on a truck, where the victim was isolated with the harasser in a tiny place, hundreds or thousands of miles for home, family and friends; with no way of escaping without the consent of the harasser. It is highly unlikely that the harassment would ever fail to meet the most stringent standard of severity.

C. Communications with "Class Members"

CRST's third request in its Motion is that EEOC withdraw its instruction that CRST not communicate with class members about the allegations of the complaint. It has not disputed that EEOC has a quasi attorney client relationship with those class members (the 132) who have requested EEOC representation, but it argues that it

should be permitted to contact "class members" who could provide evidence supporting CRST's defenses. EEOC requests that the Court order that CRST not communicate about the subject matter of individual complaints of sex harassment, beyond what has already been agreed to by the parties.

EEOC does not claim an attorney client relationship with women with whom it has not spoken. Rather, the issue is the extent to which a party may seek helpful evidence from an unrepresented adverse party in the context of a pattern or practice case (or Rule 23(b)(3) class action.) The leading case on the issue is *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) in which the Court recognized both First Amendment rights for litigants to communicate with potential class members, and the district court's authority under Rule 23 to monitor such communications. *See also*, EEOC *v. Mitsubishi*, 102 F.3d 869 (1996) which, in *dicta*, discussed the issue in the context of a pattern or practice sexual harassment suit. Following that decision, the district court again addressed the issue of "whether and in what manner Mitsubishi may interview its employees about alleged claims of sex harassment." *EEOC v. Mitsubishi Motor Manufacturing*, 960 F. Supp. 164, 167 (C.D. Ill. 1997). In that case the Defendant had agreed to conduct "mini-depositions" concerning allegations of past harassment, and the court "now makes it explicit: any future attempt by Mitsubishi to hold discussions with the alleged victims in this case concerning past incidents of harassment must be done by a noticed deposition in accordance with the Federal Rules of Civil Procedure." *Id.*, at 168.

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In this case, the parties have, until now, followed the procedures utilized in *Mitsubishi*. CRST sent, in February, 2008, a letter to all female drivers, advising them of the lawsuit. *Exhibit 2*. Following EEOC's receipt of the data concerning driver pairs, it drafted a letter to female drivers, and negotiated modifications with CRST. *See* CRST. Exhibit 1. Similarly, the second letter to drivers for whom EEOC had no individualized complaints of sex harassment was discussed with CRST. *See*, CRST Exhibit 2. EEOC understands that some women have, in fact, contacted CRST in response to the two letters.

Now at issue is CRST's desire to discuss particular instances of sex harassment with women who have been identified by EEOC. The parties have not discussed the issue beyond the e-mail correspondence attached to CRST's Memorandum as Exhibit 8 and 10. As in *Mitsubishi*, EEOC submits that communications between CRST and class members with specific claims of harassment should be through properly noticed depositions.

IV. Discovery and Trial

On October 30, 2008, the Court granted EEOC's unopposed Motion for Rule 16 Pretrial Conference, and set the Conference for November 12, 2008 at 1:00 p.m. The parties have been unable to agree to a joint proposal for dealing with discovery and trial, as requested by the Court. Defendant CRST's pending motion, filed on November 6, 2008, implicates a number of issues which are relevant to the discovery and trial issues to be discussed on November 12. EEOC respectfully submits the following proposals.

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A. Trial - Bifurcation

A number of courts have approved the pattern or practice model for sex harassment cases, and have uniformly determined that in pattern or practice sexual harassment cases, the proof of the pattern or practice and the proof of individual entitlement to relief should be bifurcated. *See, Mitsubishi*, 990 F. Supp. 1059, 1073 (C.D. Ill. 1998); *Dial Corporation*, 156 F. Supp. 2d 926, 946-47 (N.D. Ill. 2001); *IPA II*, 2007 WL 3120069 * 11 (N.D. Ill. 2007) ("While the court rejects the EEOC's proposed method of proof, the court does agree with the EEOC that bifurcation is necessary in this case. Not only did the Supreme Court endorse a bifurcated approach to pattern or practice cases in *Teamsters*, 431 U.S. at 361, bifurcation is proper here because the court will require a jury finding on the pattern or practice aspect of the case before the jury considers the individual claims so that the court can determine whether to shift the burden of production on the negligence element of the individual claimants' cases to [Defendant.]")

The bifurcated trial model presents issues of how to complete discovery of individual claims and of how to schedule dispostive motions, including those which relate to management of the trial. The size of the class is obviously relevant to those issues.

EEOC believes that the trial should be bifurcated. In the first Phase, the jury would determine whether EEOC had proven a pattern or practice of sexual harassment. During this phase EEOC would expect to call 20-25

class members, and anticipates that the plaintiff's case, including evidence from the plaintiff-interveners, would last approximately two weeks. If the jury found for EEOC, EEOC would be entitled to injunctive relief. The jury would then be asked to determine whether, and how much, punitive damages to award. *Compare, Dial,* 259 F. Supp. 2d 710 (N.D. Ill. 2003) with *IPA II,* 2007 WL 3120069 * 11. The trial would then move to a second phase in which a jury (the same, or a new one, or multiple juries) would determine damages for each class member with appropriate presumptions derived from the pattern or practice finding. Individual trials or hearings would be brief, since issues of notice and negligence would have been resolved on a class wide basis. If the jury were to find against EEOC on the pattern or practice claim, the trial would move to Phase II, with trial of each class member's claim treated as an individual case.

CRST has not expressed a position with respect to bifurcation.[6] Presumably, a single trial would require the parties to present evidence with respect to each class member of the harassment, of complaints made by the victims, of CRST's response, of lost wages and of emotional distress. In its initial disclosures, CRST identified 17 witnesses with purported knowledge of the claims of

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6. It did not respond to EEOC's suggestion of August 20, 2008, attached to its Memorandum as Exhibit 9, that the parties agree to bifurcation of trial and discovery, and that, in return, EEOC would not seek relief following an adverse Phase I finding, for class members not offered for deposition. That offer was not accepted, and EEOC would not now expect to drop any individual claim, regardless of a Phase I verdict.

sexual harassment by the named Charging Party, Monica Stark. Its Second Supplement to those disclosures, served on November 10, 2008, includes names of 105 witnesses with knowledge relating to the 39 class members who have been deposed.[7] The jury would then presumably be instructed to disregard large parts of the evidence if it were to find that CRST knew or should have known of the hostile environment, and failed to take adequate steps to remedy it. It is difficult to conceive of how long such a trial would take.

B. Dispositive Motions

EEOC submits that motions arguing the legal issues related to pattern or practice sexual harassment cases (including, but not limited to, motions for summary judgment) should be filed following the close of discovery. At that time the parties could make any arguments for summary judgment, for the appropriate standard for proving the objective element of individual sex harassment claims, for the appropriate presumptions to result from a pattern or practice finding, and for how and when punitive damages should be determined. EEOC submits that with respect to dispositive motions regarding individual class member claims, and assuming that the Court does not grant summary judgment against EEOC on its pattern or practice claim, such motions should be deferred until the completion of the Phase I trial, when the jury's decision

7. Unlike CRST, EEOC has not attached certain pages of the disclosures, because they contain addresses of the witnesses, protected by the Protective Order, entered on April 7, 2008, and they are not material to the argument.

will have established the appropriate burdens of proof and presumptions for each individual claim.[8]

C. Discovery

To date, CRST has taken depositions of 39 class members, in Chicago and in Cedar Rapids, proffered at the rate of 4-6 per week since October 1, 2008. Class members have been selected for deposition based on their availability and willingness to travel from their homes, located throughout the country, mostly to Chicago. The substance of their claims has not been a factor in their selection for deposition. Twelve additional class members have been scheduled for depositions in Detroit for November 13 and 14.

EEOC proposes that it be permitted to designate for deposition all additional class members whom it is considering calling for trial of the pattern or practice claim, likely no more than twenty-five. Any class member who had not been deposed would not testify at Phase I of the trial. Following the jury's verdict on the pattern or practice claim, additional discovery of the remaining class members can be conducted, limited to issues which had not been resolved in the first phase of the trial.

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8. In *IPA*, the case cited by CRST, the court has allowed motions for summary judgment on individual claims prior to the Phase I trial, dealing primarily with the issue of whether the harassment was severe and egregious. To date, some 46 motions individual motions have been briefed; motions pertaining to the remaining 54 class members are due to be filed by January 15, 2009. No trial date has yet been set for this case filed in 2001.

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III. Conclusion

For the foregoing reasons, EEOC respectfully requests that the Court deny CRST's Motion for Order to Show Cause. EEOC looks forward to meeting with the Court to clarify the procedures for discovery and trial.

Respectfully submitted,

s/Brian C. Tyndall
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APPENDIX AA — EXCERPTS FROM DEPOSITION OF GLORIA SOUTH, TAKEN OCTOBER 23, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07 CV-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

VS.

CRST VAN EXPEDITED, INC.,

Defendant.

The videotaped deposition of GLORIA SOUTH, called for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before CARI BILLS, CSR No. 084-003836, a Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said state, at the law offices of Jenner & Block, Suite 4000, 330 North Wabash Avenue, Chicago, Illinois, on the 23rd day of October, A.D. 2008.

* * *

[46]Q. When you had the first discussion with Mr. Garant about him saying he — he was not looking for sexual relationship was that before you got on the truck with him?

A. Yes.

Q. Did you have any concerns about getting on at all?

A. Well, after he told me that, I didn't think I had anything to worry about.

He said, I got a fiancé. I don't need no sexual favors. And I said, Good. I don't [47]neither. I said, We're on agreement with that.

I got on the truck with him. He started telling me that I couldn't double clutch, you know. I had to drive it the way he wanted me to drive and all of that and sex was the last thing on my mind.

Q. And so what — anything other than that happened on the trip from Carlisle to New York?

A. No, not that I recall.

Q. There weren't any sex-based claims or sex-based comments made?

A. No, not at that time, no, not that I remember.

Q. You mentioned, I think, right before we were taking

our break that you're remembering some other things that you didn't put in the written statement you sent to Mr. Barnes.

A. Correct.

Q. What did you remember that isn't in the written statement that you gave to Mr. Barnes?

A. When I got off the truck to get my meds for my son in Hickory, North Carolina, I met him in a Waffle House. I remembered that he told me that I had ten minutes to get off the truck and get my medicine and get back on there.

[48]Well, at that point in time I was planning on just getting my stuff and getting off the truck. After what — after some of the sexual stuff that had happened. And he had a box, like a shoebox that he laid up on the dash. And I said, What's that? And he said — and he popped it open real quick and closed it real click. Well, I only got a glance of a gun.

And he told me — he said, If you don't get back on this truck — he said, I'll kill you and your son. And he told me if I did not get back on that truck he would come out and kill me.

Q. And have you recalled any other things outside of that incident?

A. Yes. He sexually assaulted me — I don't know how to put it. Several times I would be climbing up in the truck. One time he woke me up. It was my time to drive. And I was — had sat up and was putting my shoes and socks on and I heard him open the curtains because I was looking down tying my shoes. And when I looked up, he stood there with his penis out of his pants and right in the face.

Q. Did that happen on more than one [49]occasion?

A. Yes.

Q. How many times?

A. It was four times total that I recall.

Q. Four times total in the way that you have just described or all together?

A. The way I just described.

Q. And you included at least in one of those in the statement that you wrote?

A. Yes.

Q. And how is it that you now recall the other three incidents?

A. Just like, you know, you get a blank memory and then all of a sudden it starts — stuff starts coming back to you and it's just been coming back to me different things that happened.

We were in a rest area at one time and he did that.

We was at a truck stop at one time and he did that. And, I mean, it just happened at different times.

It was on the side of the road one time. He had stopped to urinate beside the wheel of the truck. And when he come back on the truck, it had [50]woke me up because we had stopped.

And I asked him what he was doing. And he said, I just had to get out of the truck for a minute. And he said, I'm going to rest my eyes for a minute. And then the next thing I knew he had the curtain ripped open and there we were again.

Q. When is it that — how is it that you have been recalling these instances that you didn't have as part of your notes?

A. I don't know how I'm recalling them. I just know that it happened, and I tried to forget. I tried to forget all of this for a year, a year and a half. And, you know, it's something you can't forget.

What I went through, I'll never forget it. And it will always be in the back of my mind. And any time I'm put in that position, any time I'm around a bunch of men, that's what I think of. That's what comes back to me.

* * *

[58]Q. Okay. And then August 27, tell me what [59] happened on that day, if you can?

A. I'm going to have to look over this because I don't recall it exactly.

Okay. This is — after we left Carlisle, we delivered that load. We were early and we had to lay over the night because we got there on a Sunday. And we had dropped the trailer and bobtailed out to the store. And I went in and got my stuff and he got his stuff. I used the restroom and all that.

I came back out and got in the truck. I was in the truck before he was. And that's when he crawled up in the truck — and he was driving at this point and — because I had never bobtailed. It's different driving bobtail than with a trailer and I had never done bobtailing.

So he jumped up in the seat and cranked up and that's when he threw a box of condoms in my lap. And I — I made a joke out of it. I thought he was joking. I picked them up out of my lap, held them up and said, And what are we going to do with these? I'm allergic to latex. I can't use these. And I just threw them up on the dash.

And he said, You'll do what I tell you [60]to do on this truck.

And I'm like uhn-uhn.

And he said, Oh, yeah. You will do exactly what I tell you to do on this truck.

So I just blew it off. I just said this ain't going to happen.

* * *

[62]Q. So you had arrived at your destination in Ohio early on the 27th or 28th?

A. Yes.

Q. And that's — that's where this incident occurs where he throws the box of condoms on your lap?

A. Yes.

[63]Q. And you make light of it?

A. Yes.

Q. Then what happens?

A. We get back over to the shipper and I, you know, I was on the top bunk asleep. And he was on the phone. He stayed on the phone 24/7 with his girlfriend unless it was taking a shower or using the bathroom or something like that. Most of the time he was on the phone with his girlfriend. That's all I heard was chirping and, Hey, baby, and, da, da, da and just bull crap talk.

And — but I had crawled on the top bunk after we got back over there and went to sleep. And after he did the condoms, I kind of took it as a threat but I kind of blew

it off like it didn't bother me, you know, because I didn't want him to feel he had power over me at this point.

Q. Had you had experiences with men like that previously?

A. No.

He — I was on the top bunk sleeping and he told me to wake up and we would play.

And I said, No, we're not going to play. You know, it's not going to happen. I'm telling [64]you, no, I do not want to do it.

But it got to the point where he's, like, I told you this is my truck and you're going to do what I say.

Q. And so what did you then do?

A. Well, I come off the top bunk. That's when I saw him laying there naked.

MR. VISSER: Okay. Hold on just a second. Let him change his tape.

THE VIDEOGRAPHER: This is the end of tape No. 1. We're going off the record at 11:03.

(WHEREUPON, a break was taken.)

THE VIDEOGRAPHER: This is the beginning of tape No. 2. We're back on the record at 11:05.

BY MR. VISSER:

Q. Ms. South, before we changed the tapes, you indicated that you were there at the shipper's place stopped. You were on the top bunk. Mr. Garant awoke you.

Continue describing what occurred then.

A. Well, he told me to wake up and come on down. I'm going to play.

And I said, No, I'm not going to play. I'm not going to do what you want me to do.

[65]And, you know, his voice changed. His attitude changed and that's when I was scared.

I didn't know what he was going to do, you know. I just, like, okay, and, well — so I finally got off the top bunk. I got down and he as laying there naked. And he got a condom out.

And I said, We're not doing this.

And he said, Yes, we are. You're going to do what I say.

So he forced me to have sex with him. He kind of grabbed me and pulled me down on the bunk. And I resisted as long as I could and then finally it happened.

So after that, I just — he said — you know, I was burning. I was itching. I was hurting from the condom because I'm allergic to latex. And I told him it was hurting and burning. And he said, Oh, well, deal with it.

So he was like trying to be macho man to make sure I was satisfied. So I faked an orgasm to get him off of me and that's — that's the way it ended, you know. And I just got up and I had some baby wipes. I cleaned up, and I got back on the top bunk and I laid up there and I cried all night.

[66] Q. Any idea how long this whole — this first episode occurred?

A. I don't know how long. I don't know.

Q. And so when you — when you were resisting in what way did you resist?

A. Well, I kept trying to push him away and just resentment type. You know, didn't want him to touch me. Kept pushing his hands off of me. Finally, that's when he crawled on top and I thought I can't do anything now because he was a lot stronger than I was.

So instead of maybe getting beat up or — or choked to death or whatever I just gave in.

Q. Had you ever been beaten or choked by a man before that?

A. Yeah, but not during a sexual relationship.

Q. In what kind of an environment did previous assaults occur on you?

A. It was my third husband.

Q. Okay. Domestic violence?

A. Yes.

Q. How did you respond to that incident, [67]the domestic violence with your third husband?

A. I just moved out, moved on in my life. Let it go.

Q. Did you know how to operate the QuelComm?

A. I did through the orientation, but he would not let me touch the QuelComm on the truck.

Q. Did you have a phone with you?

A. I did but it was dead, and I was trying to get a phone charger. Every time we stopped at Walmart or K-Mart or whatever, I tried to get a phone charger. But every time we did — I was in there trying to get that.

See, he was aside me the whole time after that first incident. He was no more than an arms length away from me. If I stopped to use the bathroom, he was standing outside the bathroom door from the time I went in until the time I came out. So I was never away from him more than an arms length.

And if we'd go to Walmart, I would be looking for a phone charger or whatever. He would say, Oh, come on. We

need to get groceries. We need to get back on the truck. We're wasting time. [68]And so I'd get the groceries and we would go on.

And he would say, You could use my phone any time you want to. And that was a decoy for me not to buy another phone or have a phone.

So he said, I'm about out of minutes. I don't get paid until such a such a day. Could you get a phone card because you can use my phone any time you want to. Any time. And so I borrowed him the phone card which he reimbursed me on that and the groceries that time.

And I asked to use his phone. Well, this is important, you know, with me on the walkie-talkie. He'd be on the phone, And I would ask him again. And he'd say, You're going to have to wait until after 9:00 when it's cheaper. And every time I asked to use it, it was different. It was a different excuse every time. So I never got to use his phone.

So the last I think about two or three days before I got off the truck I finally got a boost phone but a lot of places it wouldn't pick up so I had no signal.

Q. Going back to this initial — the initial trip there from Ohio to Denver, then.

[69]August 28th through the 30th of 2006, did you — when you stopped at truck stops, did you attempt to go to a pay phone?

Appendix AA

A. The only attempt I had made to get help is one time we were at a — we was going to stop at a truck stop and get something to eat. And, you know, buy some drinks and stuff. And I had some bills and I took a sticky note and I put down the trailer number, the truck number, his name, my name, the company name, where we were headed. And I said. "Call 911" is what I had put on my sticky note.

And when I handed the lady the money and she saw it, she's like — I said, Just call 911 — call. I said, Just call and give them that information. And he grabbed me by the arm and pulled me out the door. I didn't even get my change back from what I bought. That's the only time I could — I had the chance to get help and tell them what was going on.

Q. And when do you think that — when do you think that occurred? Was that right after the first incident?

A. No. It was like the second or third [70]incident.

Q. What about the other — you had no opportunity to simply walk over to the phone and call 911?

A. No. He was — like I said, he was right beside me. He was within an arms length of me from the very first time I went until I got off the truck. The only time — even I would act like I was going to go in and take a shower. I would open the door, you know, he — he was standing there. I would go in a bathroom, and I'd wait for a few minutes. And then open the door and he'd be standing there.

Q. You got on the truck with him on the 25th. And just looking at your notes, as of the 29th you still had not — you still hadn't taken a shower?

A. No. I had two showers in 17 days.

Q. You were requesting this of him?

A. Yes, every day.

Q. And what was his response?

A. We don't have time. We don't have time. We don't have time to stop. We will take one on the next fuel break, fuel stop.

[71]Q. On the 29th it says that you did have a bathroom stop to change drivers and you had another sexual encounter with Mr. Garant.

A. Yes.

Q. And describe how the second encounter came about. You think it was the next day. That's what your notes suggest.

A. I'm thinking it was — it's been so long ago. I mean, I remember things, but I can't remember the exact dates and, you know, what day it happened and stuff.

He — this is the time where we went in the bathroom and I came back out and he was standing — you know, I peaked around and he was standing outside.

And then I went back in and used the bathroom and I freshened up, you know, with a wash cloth and a towel and stuff like that. I came back out and I didn't see him sitting in the truck. So I put my stuff in the truck and when I started to get back out, I heard him. And I was sitting there and I was waiting on him. And I thought — because I had my window down. I was smoking. And I thought, what did he say. And I was looking [72]around.

Anyway, he wasn't in the truck. And I thought he was still in the bathroom. So when I ripped open the curtains to go back there and lay down because it was his turn to drive, he was laying there naked there again and that's when the second — second attack happened.

Q. So what happened after you pulled the curtains back and he is there naked?

A. He said, You know what you got to do.

And I said, Not again. I said, How many times do I have to do this?

He said, As long as I tell you to.

So instead of fighting with him and resisting with him, I just gave in for my safety because I didn't know what he was capable of doing.

Q. So you had just gotten back — where do you think you were at a truck stop?

A. No, it was a rest area.

Q. At a rest area?

A. Yes.

Q. And he had come back to the truck first.

Had you thought about using the phone at the rest area?

[73]A. Well, I didn't know where he was at and what I did when I first got there, I went in the bathroom and I just stood there for a minute and I come back out because I thought he, you know, was just following me over and making sure I went in the bathroom and he went in the bathroom.

But when I turned around and came back out like a couple minutes later, he was standing there. So I just went on in, used the bathroom, freshened up, come back out. Act like everything was okay. Because I didn't know where he was at. I didn't know if he was hiding behind a bush or what. I didn't see him at that point.

So I went on up to the truck to make sure he wasn't in the truck. And when I started to get back out to use the phone is when he hollered. And I thought he was outside and I looked around outside and I thought, shoot, he's watching me — you know, he's keeping an eye on me.

And when I ripped open the curtain, he said, You know, what you —

I said, How many times do we have to do this?

He said, You know what you got to do.

[74]And I started to get back off the truck. He grabbed my arm, pulled me to him and it happened. And that's the way it happened the other three times. He would grab my arm and pull me to him.

One occasion I had done laundry. And he had went over to the restaurant — told me he was going to get a coffee or something and I was with the clothes. And I started to step outside because there was phones right on the other side of the wall. And I started out the — out the — out the laundry thing to use the phone and he was standing there.

Q. An incident occurred where you took out a stop sign with a truck?

A. Yes.

Q. How did that come about?

A. Okay. I was on the ramp and he was over in the driver's — in the passenger's seat and he was sitting there like this texting on the phone. And I was sitting at the stop sign.

And I said, Dude, you need to move because I can't see my mirror. And he looked up at the mirror and he said, Just go.

[75] And I said, I can't see my mirror, move. He said, Just go.

So when I pulled out, I didn't swing out wide enough and I took out the stop sign. And I drove over to the truck stop and that's when the other driver came back there and told him that I had took out a stop sign.

So he wrote up — he got on the QuelComm and wrote up a report that I took out a stop sign. He didn't tell them why I took it out. I couldn't see my mirror. And so I didn't even get out of the truck then. He fueled and we got back on the road and I didn't have a chance to go to the bathroom or anything at that time.

After the stop sign incident, after he called it in and told them that I had took out the stop sign, then every time after that point if we stopped to fuel, if we stopped to eat, if we stopped for anything, I had to do the pretrip inspection. I had to fuel the truck. I had to keep the inside of the truck clean and the windows outside clean. The lights — you know, anything that needed to be done to that truck after that point, I had to do it. I had to do it by myself.

[76]I was like his slave after that incident happened. He wouldn't help me fuel. He wouldn't help me pretrip. He wouldn't help me do nothing.

Q. You believed that the first sexual interaction occurred prior to the stop sign?

A. Yes.

Q. Do you think that the rest stop sexual interaction happened also before the stop sign or afterwards?

A. I don't remember. If it was before or after. I know the first time it was before.

Q. So by the first — in the first four or five days, did you have any contact with any other employee of CRST?

A. No.

Q. During the entire time on the truck with Mr. Garant, did you have any communication with any other employee of CRST?

A. No.

Q. Was there tension between the two of you related to his training or lack of training of you?

A. Rephrase that.

Q. Did it frustrate you that he was not training you?

[77]A. Yes.

Q. Did you express that frustration to him?

A. Yes, I did. I told him I was on there for a career to learn how to drive, not for the contact that we had had.

Q. How did he respond to that?

A. He just told me it was his truck and I would do what he told me to do.

Q. Did you ever hear — overhear any telephone conversation between Mr. Garant and dispatch at CRST or did he just work through the QuelComms?

A. Most of the time he worked through the QuelComm. He never called them on the phone that I recall. He was on the phone 24/7, so I don't know who he was talking to. Most of the time it was his girlfriend.

Q. So I'm looking at your note that's dated August 31 on your — dated August 31 on Exhibit 232. That's the last date that you include, right?

A. Yes, I believe so because after that I was making my own notes, and I wasn't putting dates on it. I was afraid he would catch me.

[78]Q. Did you tell him that you wanted off of his truck as early as five or six days?

A. Yes, I told him several times I wanted off his truck.

Q. And what was his response?

A. Well, one time he stopped in the middle of nowhere — I mean, I don't even know what state I was in at this time. And I was thinking it was Wyoming because of the desert.

But he just pulled over on the side of the road and told me to get out. And I went back and was getting — like I said, I don't even recall what state. I went back up to pack up my stuff and he hollered back, What the hell are you doing. I said, I'm getting my stuff and I'm getting off your truck.

He said, You can get off the truck but you are not taking your stuff. And I said, Well, it's mine. I'm taking it. And he said, No, you're not.

So he hit the fuel pedal — gas pedal and my head hit the sleeper wall. Well, I'm like dazed for several hours. I don't know how long it was. It was like I was in a state of mind that I [79]didn't know what was going on.

And then I told him several other times, I want off your truck; I want off your truck.

You can get off the truck, but I'm turning you in as abandonment. He said. I'm going to tell them that you abandon the truck. He said, That way you'll never drive another truck.

And I knew enough about the laws and stuff that it would have went on my dec report and I wanted to drive a truck. So I didn't want him turning me in that I abandoned it

Q. And in your notes you tell him you wanted to go to Cedar Rapids since you were in Iowa anyway?

A. Yes.

Q. When you look at the trip log, Exhibit 231, can you tell me when the next time was that you were in Iowa after you — after that trip — after you got to Denver on August 30th. It looks like from Denver you went up to Oregon.

A. Then Oregon to North Carolina.

Q. So from Oregon to North Carolina between August 31st and September 2nd.

So on that — is that the trip that [80]you're — somewhere on that trip you're in Iowa?

A. Yes.

Q. From looking at your notes?

A. Yes.

Q. And he said he wouldn't drive off route?

A. Correct.

Q. But you said he would just take you home?

A. Yes.

Q. And how far is Gastonia from Hickory, North Carolina?

A. About a 30-minute drive.

Q. So you're continuing to have this disagreement as you go across the country through Iowa continuing on to North Carolina?

A. Correct. I told him I didn't want off the truck at home. I wanted to go back to – to Iowa because I wanted a new trainer. I just wanted to get off his truck. I just wanted to be away from him. I just — I wanted another trainer. I just wanted away from him. That was the main problem.

* * *

[93]Called Scott Rosekrans the next morning and told him what was going on. That I got off the [94]truck and everything. And I told him — I said, I need to come in and talk to you or somebody.

And he said, About what?

And I said, Sexual harassment. I said, The way I was treated on this truck. I said, He treated me like a slave and just a piece of meat.

And they sent me a taxi and sent me right back over to the terminal. Had to pack everything I had back up and they — I went in and talked to Mr. Barnes, and I talked to Scott and his supervisor and another man. And then I talked to an HR man, which was Mr. Jim Barnes, and they put me on another truck with two guys from Cedar

Rapids to North Carolina. I asked for a bus ticket. They wouldn't give it to me. I asked for a plane ticket. They wouldn't give it to me. They put me on a truck with two more men that I really didn't know. It really scared me then because, you know, now I've got two to deal with instead of one and they drove me to North Carolina and dropped me off.

Q. Did any of those two men inappropriately, you know, make any inappropriate statements or advances toward you?

A. No, but I didn't know that when I got on [95]the truck. I had already been with this other dude all of this time and then they put me on another truck with two more guys. I mean, that was – that wasn't right.

Q. Did you — did you tell Mr. Barnes that you wanted to take a few days off and then —

A. Yes.

Q. — be reassigned to a new driver?

A. Yes.

Q. And you're claiming that you asked the company to give you an airplane ticket or a bus ticket to North Carolina from Iowa?

A. Yes.

Q. And instead they said we have got a truck going that way and you rode with two other drivers.

A. Yes.

Q. And after you got — and you told — you gave — you shared your facts with Mr. Barnes and with Scott?

A. And Scott's supervisor.

* * *

[113]Q. What was their response, if any, when you were talking about what happened to you?

A. To me, they acted like — to me they were listening but they wasn't listening.

Q. Did they ever ask you what you were planning to do with respect to what happened to you on the truck?

A. No.

Q. Did they tell you what they were going to do themselves with respect to what you had just told them?

A. Said they would be terminating Mark Garant.

Q. And did they ever tell you at any point what happened with Mark Garant? Did you ever find out what, in fact, they did?

A. No. I did not.

Q. Did anyone from CRST ever tell you that they had, in fact, fired him?

A. No, they didn't.

Q. Who was it at this meeting who told you they were going to fire Mark?

[114]A. Mr. Barnes.

* * * *

APPENDIX BB — EXCERPTS FROM DEPOSITION OF RAMONA VILLAREAL, TAKEN OCTOBER 16, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CRST VAN EXPEDITED, INC.,

Defendants.

The deposition of RAMONA VILLAREAL, called for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before KRISTIN C. BRAJKOVICH, a Certified Shorthand Reporter, CSR. No. 84-3810, of said state, at Suite 4000, 330 North Wabash Avenue, Chicago, Illinois, on the 16th day of October, A.D. 2008, at 9:09 a.m.

***

[36]Q. Do you believe that you were sexually harassed while you worked for CRST?

A. Yes.

Q. Who do you believe harassed you?

A. John DeJong.

[37]Q. Anyone else?

A. Charles Boone.

Q. Booth?

A. Booth. Thank you.

Q. Anyone else?

A. That was it.

***

[39]Q. When was the first time that Mr. DeJong engaged in behavior that you felt was sexual or inappropriate?

A. When we first took off, about the second day.

Q. And what happened at that time?

A. He was mentioning something about would I be the kind of person to be interested in someone like him.

Q. And what did you respond?

A. I was shocked. I was just staring at [40]him.

Q. Were you married at the time?

A. No.

Q. Was he?

A. I don't know.

Q. And you were alone with him on the truck at this point?

A. Yes, ever since I got to Puyallup, Washington.

Q. And how many times did he ask you that?

A. A certain amount of times during those— I mean, it's hard to say. I don't know. It was the beating that got me the worst. It was not so bad as the sexual harassment.

Q. And what was your response to him when he asked you if you would be interested in him — in someone like him?

A, I don't recall responding to him, I just stayed quiet. I guess, because I remember him saying, Well, I can satisfy a woman like you. Oh, I know how to handle a woman, someone like you.

I remember I said, Sure, I'm sure you could. I'm sure you can. You are old enough to be my grandpa.

[41]Q. You told him that?

A. Yes.

Q. And these are also comments that were made on the truck when just the two of you were present?

A. Yes.

Q. Were those comments made early in the time when you got on the truck or —

A. Within the first week.

Q. Did you tell anyone at the time that those comments had been made?

A. No.

Q. And approximately how many times did he tell you that he could satisfy a woman like you?

A. That was the time only, I guess.

Q. One time. Did he state that he knows how to handle a woman like you just once?

A. (Nodding head.)

Q. And what was the next time Mr. DeJong engaged in behavior that you felt was sexual or inappropriate?

Appendix BB

A. When I was very sound asleep —I don't recall where it was or what state. I knew about stories from the Fontana terminal that they tell [42]you hide your belongings, your wallet, your money. I would hide mine between my legs, inside my panties, so— because I was robbed at the motel when we were doing orientation. My paperwork and stuff had gotten stolen from me.

So I started hiding my wallet inside — my belongings inside my panties because in the pockets it would fall off when you sleep.

Q. Is this just while you slept you stuck it there?

A. Yes. And one night John DeJong had gone into my underwears and fished out my wallet to take out the gas card, the Comdata card, when we would diesel. I did not know this until two days later when he happened to mention, By the way, I have your Comdata card for diesel. I had to get it from you the other night because we were out of diesel.

Q. How did he know where to look for it?

A. Exactly. I would like to know that, too.

Q. You had not told him that you kept it there?

A. No. I was in so much shock, then I just don't recall a lot from there.

[43]Q. Do you recall when that was, how many days had you been on the truck together?

A. It was already about two weeks, two and a half weeks, give or take.

Q. How many times did he do that?

A. Once.

Q. And did you tell anyone about it at the time?

A. I told the dispatch— the female.

Q. You told a female dispatcher?

A. The one that— the assistant of that guy Brian. I don't recall their names.

Q. A female dispatcher out of Washington'?

A. Yes.

Q. Was she your direct fleet manager or no?

A. I just know they were dispatchers.

Q. Okay. And you believe Brian was a dispatcher, as well?

A. Yes.

Q. So you believe there were two dispatchers who worked in Washington?

A. Yes, ma'am.

Q. A female and a male?

A. Uh-huh.

[44]Q. Do you recall how you got in touch with the female?

A. Within those two and a half weeks or so, I ended up getting a Nextel phone that was on sale in a truck stop. They only needed $50, which I only had just about that much, and they would hook up the phone for you. It was around that time when I started calling that lady with my Nextel phone.

Q. Okay.

A. I think it was the pay-as-you-go phones or something like that. 1 can't recall that phone very well.

Q. Okay. So you believe you called her from the cell phone?

A. I know I did because I didn't know how to use the Qualcomm. I did not know — I learned eventually, but I did not know how. He was supposed to teach me, train me. He was my lead driver. He was supposed to train me.

Q. And you believe it was about two and a half weeks in when you called?

A. Give or take. It was something I like that.

Q. And did you call her while you were on [45]the truck or from a truck stop or where?

A. From a truck stop where he wouldn't hear me, where he couldn't hear me.

Q. And this was after he took the wallet out of your panties?

A. No. It's hard to recall because in the first week he was talking that way. In the same first week, he beat me for a mistake I had done. After the beating, it just kept going. It just kept happening.

Q. When was the first time that he beat you?

A. In the first week.

Q. What happened?

A. We were going out of Washington, going up a very steep mountain. I did not know how to downshift. I did not know how to drive. That's why he is there for. He went to the back to go to sleep, and when we were coming up to this steep mountain, the truck started rolling back. I didn't know how to downshift to –

Q. Do you want to take a moment?

A. I'm fine.

I didn't know how to downshift to keep [46]going up. He jumps out of the back and he grabs the stick shift and it starts grinding. He keep — he started yelling to push the clutch, push the clutch, and I did. He goes, Rev up the RPMs, and I did. And it wouldn't go in and we are — I just put both my foot on the brake because I was scared.

Q. So the truck had been rolling backwards?

A. The truck was rolling down and it was in an area where there was a lot of traffic, so there was a line of cars behind us. And it was — I almost took a whole bunch of cars.

But he got it in gear, and we slowly started going up again. And when we started going, that is when he started hitting me really hard, as I was driving up the hill. He cussed me out, and he went back to the back again.

Once I got to the other side, he had to come back again and help me but he was telling me, You stupid Mexican, cussing at me and putting me really — putting me down. He was putting me down really bad.

Q. Did he hit you with his fist or

A. Fist.

Q. On what part of your body did he hit [47]you?

A. Right here on my arm (indicating), and that was just the first time.

Q. Did you tell anyone about it at that time?

A. Yes, I did.

Q. Was that the time when you called the female fleet manager?

A. When I was able to get a hold of a phone.

Q. You don't recall if that was before or after?

A. I don't recall. I could have used a payphone. I know there was a 1-800 number or something, but I couldn't call — I got a hold of her and I told her, Please get me out of this truck. He hurt me. He beat me. He's talking really nasty.

Oh, just make it back, she said. Just make it back, and we'll route you with someone else, but they kept sending us further and further away.

Q. So you believe you told her that he beat you and was talking nasty to you. Did you tell her anything else?

[48]A. I told Brian too. He also said, Just wait it out until we can route you back.

Q, How long in between the times that you spoke to the female did you call Brian? Was it the female you spoke to first?

A. I probably spoke to either one of them. I spoke to her. I spoke to him. I spoke back to her. I blocked so much of this out, I just— I was terrified. I just blocked so much of it out, to be honest. That's why I didn't want to do this because I didn't want to have to remember it.

Q. So they basically told you, We will get you off the truck but you have to get back?

A. Just wait it out until we can get you back to Puyallup, Washington, and we'll get you a different lead driver.

Q. How long was it in between the time you raised your first complaint and the time they got you off the truck?

A. The first week and a half or the first week when he hit me.

Q. How many times did you speak to the female fleet manager about your complaints?

A. As many as I could. As many as she [49]would take the calls.

Q. You don't recall specifically?

A. No.

Q. How many times did you talk to Brian?

A. The same amount of time.

Q. You don't recall?

A. No.

Q. Did you tell anyone else, other than Brian and the female fleet manager?

A. I didn't know who else to tell.

Q. Did you ever call human resources?

A. I didn't have the number. I don't recall this book. I first saw this book, believe it or not, when I got in the truck with Juan Ponce.

Q. I'm sorry. With who?

A. Juan. That was my co-driver I got later on. That is when I first saw this book. I remember it, but it was all dirty and everything. And I remember it because of this, it was this (indicating), because he was the one that ended up teaching me what he needed to teach me, and he was not a lead driver. He was my co-driver. The poor man had to take me in not knowing nothing because the lead drivers taught me nothing.

[50]Q. Going back to your time with Mr. DeJong. How many times did he beat you?

A. Twice.

Q. When was the second time?

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A. When I was stopped by an officer for speeding because I was going down, and, again, I did not know how to— how to control— how to downshift. I was learning. I was learning and the officer stopped me, and he came to this side.

He said something about door. I misunderstood him, so I jumped out of the truck and I ran around to the other side, to the driver side —passenger side, and he looked at me odd. And he goes, What are you doing? I said, You said the door was open. He goes, No, I was asking you to unlock the passenger side. Oh, I'm sorry.

So in that - I went around again and unlocked, but John stayed in the back. And the officer says, You do realize you were speeding? I go, No, sir. Well, I was trying to slow down but I can't control all of that weight and my lead driver needs to help me, and he's in the back sleeping.

So he called out John and he asked him, Are you her lead driver? He goes, Yes. Well, can [51]I see your logs? Oh, Lord, that was a bad day because he got so mad. He did not give me a ticket. I did not get a ticket. He just gave me a warning, told me — verbal warning. He said, Just be careful here in—I think it was in Ohio. I'm not sure. He goes, We have speed limit of 55. I go, Yes, sir. I'm so sorry.

And as soon as the officer left, he started hitting me on this side, and he hit me so hard because I was sitting on the passenger side, closing the door and securing it when the officer left. And he started just hitting me. He hit my head and caused me knots on the head and hit all

over my arm (indicating). And I just— — I could not take it. I guess I was in a cloud after that because I couldn't remember nothing else after, pretty much.

Q. Do you recall when approximately that happened?

A. I think it was the last week I was with him. The last week I was with him because when I did call Brian or that woman, Pat, and I told them, He hit me again. I'm all black and blue. Please get me off this truck, and that is when they [52]finally routed us back. They were real nervous.

Q. The first time that he hit you, where were you, do you recall?

A. Excuse me?

Q. The first time that he hit you, do you recall what state you were in?

A. In Puyallup, Washington. We were barely starting, barely getting out of there on our first load.

Q. And what other behavior, if any, did Mr. DeJong engage in that you felt was sexual or inappropriate?

A. It was that panty thing. That was it.

Q. The one time he took your wallet?

A. He would talk on the phone with some girlfriend that he would talk sexually on the phone, so I would have to step out of the truck.

Q. Did he ask you to step out of the truck or did you—

A. Yes, when he would get upset, he would always — he would throw me out of the truck in very cold temperature weather out there in the United States, whatever state I was at, and I had to wait until he was done talking on the phone with [53]that woman.

Q. And how did you know that he was having sexual conversations?

A. Because I asked him. I said, John, would you stop it. I'm in here. That's when he got mad and he told me to get out. You don't like it, get out.

Q. Originally, you were on the truck and heard some of the conversations?

A. Yes.

Q. You told him you didn't like it and he said, Get out?

A. Yes. It was like phone sex he was having with the woman.

Q. How many times did he have phone sex?

A. Oh, many times.

Q. Do you recall how many?

A. Oh, the count of five, six, seven times, whenever he could get a hold of the lady.

Q. Do you recall if you reported that to Pat or Brian?

A. Yes.

Q. And do you recall when you reported that to them?

[54]A. It was when I was complaining about the beatings and what he had done about the panty thing, and I let them know. Empty promises.

Q. So you believe that you complained to them the first week you were on the truck together?

A. Oh yes, I did. Because we were told in orientation, if we did not get along with our lead drivers, to report it right away so we could be removed and be given a different lead driver. That was what we were told in orientation.

Q. You were also told you could contact HR if you had any complaints?

A. Yes, I think so, we were. I just didn't know the number. I remember asking John for it. He wouldn't give it to me.

Q. Do you recall if Mr. DeJong engaged in any other behavior that you felt was sexual or inappropriate?

A. No.

Q. Did he ever proposition you?

A. Yeah, the first week.

Q. Do you believe he ever touched you in a sexual way?

A. Yes, he did, when he went fishing into [55]my panties for my wallet.

Q. On any other occasion did he touch you in a sexual way?

A. No.

Q. Other than the first time when he asked you if you could see yourself with a man like him, did he make any other propositions?

A. No.

Q. Did he ever make any sexual comments directed towards you?

A. Yes.

Q. What were the sexual comments?

A. He liked my big boobs.

Q. When did he say that?

A. In the first week we were in the truck. I guess that's what led to, Could you see yourself being with a man like me and I would know how to satisfy a woman, stuff like that.

Q. That was all in the same conversation?

A. It was — I think that's what had got to the conversation because of my breasts.

Q. And do you recall if you told Pat or Brian about that?

A. Yes.

[56] Q. That was all in your first complaint to them?

A. Pretty much, yes.

***

[59]Q. Did you ever report any complaints about Mr. DeJong to any senior executives at CRST?

A. Yes, I did. At Cedar Rapids, I talked to a gentleman there. That is when I met — Susan Ayers ended up being my dispatcher then. That was for Juan Ponce.

Q. That was for what?

A. Juan Ponce, my co-driver. I went and talked to a gentleman there.

Q. Do you recall who you spoke to?

A. I can't recall his name, but he was HR. And I told him everything that happened, and he said he was going to go look into it, and I never heard from him again.

***

[65]Q. You have been handed what has been marked as CRST Exhibit 124. This Trip Inquiry reflects that you were on the truck with Mr. Booth from August 30. 2005. to September 8th 2005. Does that sound about right?

A. Repeat the question please.

Q. It shows that you got on the truck with Mr. Booth on August 26, 2005 and that you got off the truck on September 8, 2005. Does that sound right to you?

A. Yes.

Q. Do you recall who your fleet manager was at the time that you drove with Mr. Booth?

A. Same people.

Q. Same two. Do you recall if it was the man or the woman. Pat or Brian?

A. It was the woman that put me with him.

Q. Do you believe she was your fleet manager?

A. I think so. She was the one— both of them would say which truck with whom we would go. I thought that that was the fleet manager.

Q. Okay. You believe they were both your [66]fleet manager?

A. Yes, or their assistants. I don't know.

Q. Do you recall if you had any home time during the time that you were on the truck with Mr. Booth?

A. No home time for me. It was his home time.

Q. You did get off the truck?

A. I was stuck in the truck. I only got off to use— he parked the truck at his mother's house, and I had to play housekeeper for his family just so I could use the restroom and bathe.

Q. How long were you there?

A. His home time.

Q. Do you recall how long that was?

A. A week, I think.

Q. Did you have the opportunity to go home?

A. No.

Q. Did your fleet managers tell you you had to stay on the truck during the home time?

A. Yes.

Q. But you weren't driving?

A. No. The truck was parked, and it was his truck. He was an owner-operator or something, [67]so he took the key.

Q. Did you stop at any of CRST's terminals during the time that you drove with Mr. Booth?

A. I can't recall.

Q. When was the first time that Mr. Booth engaged in behavior that you felt was sexual or inappropriate?

A. It was after.

Q. After what?

A. After we took off. He was angry because the female dispatcher, they had something together, but I made a mistake. When she called or Qualcommed it, something, I remember typing, He's with his wife. She found out. He got mad. She got mad, so I was starting to be mistreated.

Q. You believe that Mr. Booth had some sort of relationship with the female fleet manager?

A. Yes.

Q. Why did you believe that?

A. Because I could not type very well on the thing, so I told her call me or I'll call you. She called me and she asked me, Where's Charles? I said, He's at some camp — cabin out there in the woods. He's not alone? No, he's with his wife, [68]girlfriend, I don't know, with his kids.

She was very, very furious, and I guess she talked to him and he – after that started treating me different.

Q. And what did he do"?

A. On the way back or somehow we were routed back towards Puyallup. We stopped at some terminals— not terminals, at truck stops. There was one night I was hungry, and we stopped at this truck stop and he got himself some hot dogs and whatnot and I got myself some food.

But he loved to play on the radio, on the CB radio, and he had the light on. And I was sitting there eating my food, and I guess some of the truckers around there noticed who they were talking to. They saw me, so on the radio said, Have her do a peep show, have her do a peep show.

And I did not understand radio, that kind of talk, truck driver talk. I don't understand that. All I know is he turned around, he said, Flap them out. Let's see a peep show. I go, No. He said, Show them, just go like this, just

rip off your shirt and just show them some tits. I go, No. I said, Why would I want to do [69]that? He goes, Well they'll pay 100 bucks a peep. We need the money. I just left my food there, and I went to the back.

Q. So some other truck drivers had said over the radio that they wanted a peep show?

A. Yes. And he wanted me to show them my breasts.

Q. And you refused?

A. I refused. I told him, That's not right.

Q. And this was after the home time?

A. After the home time.

Q. And approximately how many days were you on the truck with him after that happened?

A. I think it was about a day or two. We were not that far from Washington, from Puyallup, within that period of time. He would drive while he was typing. He was typing away, trying to — to her. He was Qualcomming to her that whole time while he was driving because I remember I got up to go to the front and I saw him, he was driving as he was typing, which is very dangerous. And I kind of looked over his shoulder, and he was typing to her and I remember reading, I want her off my truck.

Appendix BB

[70]Q. How long were you supposed to be on the truck with him originally?

A. The remainder of the training.

Q. Did you end up staying on with him for the remainder of your training?

A. He didn't train me. I was just there for the remainder of my training, but I wasn't trained. I was at him with home time— his home time on my time.

Q. Did Mr. Booth engage in any other behavior that you felt was sexual or inappropriate?

A. No.

Q. Did you tell anyone about the peep show request?

A. Yeah, that lady.

Q. You told your female dispatcher?

A. Yes.

Q. When did you tell her?

A. When we got there and he left. She sent him to a motel room, and she didn't want to hear it.

Q. So when you got to Washington, you met with her face to face?

A. Yes. I asked her. Why are you [71]taking— I'm not done with my training. I didn't learn nothing.

Q. And what did she say when you told her?

A. She didn't want to hear it. She cut me off. She was very rude. She was very upset with me. She said, The taxi will be here in a few minutes to take you to your motel room — or, no, to the bus station. They stuck me on a bus and sent me home.

Q. And were you paired up with someone shortly thereafter?

A. No. I had to look for my own co-driver.

Q. How did you find a co-driver?

A. I called Fontana, and I told them what had happened, that I was no longer driving and I was done with my training. I don't recall who I talked to, but I did complain to him, too, about what had happened, and he didn't want to hear it.

Q. Who was this?

A. I don't recall. I don't recall. I just know that I did let them know that I was available for a co-driver, that I needed to get back to work.

Q. Was it a fleet manager that you were [72]talking with?

A. I think so, but it was a male.

Q. And this was over the phone?

A. It was over the phone.

Q. And what did you tell him specifically about any of the behavior of Mr. Booth or Mr. DeJong?

A. I just said shortly, I said, I was beaten, I was fondled, I was humiliated, and I was taught nothing. I was being very sarcastic. I was being sarcastic. I was being rude, I know, but I was just angry.

The whole experience of learning how to truck driving was going down the drain for me. My dream of being a truck driver was going down the drain. But I told him, I need a co-driver. I would rather have a female, like I have been requesting from the very first day I was there. We wanted female co- — female trainers. And they told us it was very rare that they would give us a lead driver— a female lead driver, that we would have to take what we can.

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APPENDIX CC — EXCERPTS OF DEPOSITION OF TRACY TUTTLE, TAKEN AUGUST 6, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. 1:07-CV-95

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-vs-

CRST VAN EXPEDITED, INC.,

Defendant.

The videotaped deposition of TRACY TUTTLE, called for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before THERESA A. VORKAPIC, a Notary Public within and for the County of Kane, State of Illinois, and a Certified Shorthand Reporter, CSR No. 84-2589, of said state, at Suite 4000, One IBM Plaza, Chicago, Illinois, on the 6th day of August, A.D. 2008, at approximately 9:20 a.m.

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Appendix CC

[78]Q. Do you remember the name of your dispatcher back then?

A. We called him Livi, Livingston.

Q. It was John Livingston?

A. Yes.

Q. There is a reference to conversation between you and John in your letter that I'm going to refer you to. It's the second page of your letter, the third paragraph on the bottom.

Do you see that, the May 17 entry?

[79]A. Uh-huh.

Q. Could you read that out loud, please?

A. "I talked to Sherry Cook and she talks to John about getting me off the truck."

Q. Could you read that paragraph?

A. "I had talked with John the day before but was unable to let me him know how bad it had gotten. When I was packing, Jason grabbed my"— it's supposed to say leg— "so hard it left marks."

Q. The reference to John there is to John Livingston?

A. Yes.

Q. What you were saying there is you had spoken to Mr. Livingston on the 16th of May?

A. Yes, and previous to that also.

Q. There is no reference in this letter to any prior contacts with Mr. Livingston?

A. I had talked to him the day before but was unable to let him know it was getting worse.

Q. I'm sorry.

A. I guess, you know, how bad it was getting, I'm sorry. Was unable to let him know how bad it was getting, gotten, but I know I had [80]talked to him previously, you know, and the problems with Jason slapping me in the ass and on the thigh and on the head and telling me the bed didn't work and stuff like that. It just continued to escalate.

Q. What I'm trying to focus on right now is what the letter tells us about conversations with Mr. Livingston. This paragraph says: "On May 17 I talked to Sherry Cook and she talks to John about getting me off the truck"?

A. Yes.

Q. The reference there is to John Livingston, correct?

A. Yes.

Q. "And talked to John the day before but I was unable to let him know how bad it had gotten."

A. Yes.

Q. Correct. That's what that says?

A. Yes. Yes.

Q. This tells us on May 16 you directly spoke to Mr. Livingston, correct?

A. Yes.

Q. And what you say here is "I was unable [81]to let him know how bad it had gotten"?

A. Yes.

Q. It doesn't refer to any prior discussions with Mr. Livingston?

A. No.

Q. And it doesn't refer to any previous discussions with dispatch, does it?

A. No, but I believe what I'm trying to stress in the contents of how bad it had gotten meaning it had been discussed with him previously and it was getting worse.

Q. The summary starts on April 16, correct?

A. Uh-huh.

Q. You have to answer verbally.

A. Yes.

Q. And it goes right up to April 17 at the end of this, correct?

A. Yes or no. May.

Q. I'm sorry. Did I say April again? May 17, sorry. And no where in that paragraph relating to what happened on May 16 and 17 is there a reference to you talking to dispatch about your problems with Mr. Standridge, correct?

[82]A. Correct. There is no reference to it.

Q. On May 17 is when you made this delivery to Kohls in Wisconsin?

A. Yes.

Q. Your training with Mr. Standridge was over, was it not?

A. No.

Q. It would have continued longer?

A. Yes.

Q. And you were taken off of his truck when you made your complaints about what was happening to you, correct, at the end? It was because of your complaints that you were taken out of that training situation, correct?

A. Yes.

Q. In terms of things that Mr. Standridge did, looking at it today, is this a — let me ask it differently.

In terms of things that Mr. Standridge did towards you, is there anything in reading this letter today that you think you left out?

A. Yes. I didn't mention in the letter how many times he slapped my ass, slapped my thigh, smacked me in the forehead. I didn't put [83]in here how many times he references how big his dick is. I tried to make this somewhat of a summary, so I didn't give every word that was said, every action that was done because it was on a daily basis that he'd slapped me in the ass, it was on a daily basis that he would smack me in the forehead because I was leaning forward and in his view. Some of these things were discussed verbally over the phone with Sherry and Lisa, Sherry Cook being my recruiter.

Q. You said that Mr. Standridge slapped you on the thigh, slapped you on the ass and the forehead situations were ones where he was pushing you out of the way, hitting your forehead to push you back out of his view, is that what he was doing?

A. Yes.

Q. The occasions where he slapped you on the thigh, how often did that occur and what were the circumstances?

A. As the time with him progressed, it happened more and more often. The first it was maybe one every two or three days, and then it got to almost a daily occurrence when he was touching [84]me.

Q. Would this happen when you were sitting in the truck next to him?

A. Sometimes it would be sitting in the back, if he came up behind when I was climbing in the truck, he had no problem with helping me by putting his hands on my ass and pushing me in.

Q. I'm trying to break this down. The slaps on the thigh, those occurred when you were sitting next to him in the truck?

A. Yes.

Q. What were the circumstances?

A. The circumstances would be that he was driving down the road and decided to smack me.

Q. Did he hit you hard?

A. He hit me so hard at one time it left a welt for hours.

Q. Why would he do that?

A. He said he was playing. As far as his intentions, I can't tell you. You would have to ask him.

Q. Was he doing it out of anger as far as you could tell?

MS. SZROMBA: Objection. Foundation.

[85]BY THE WITNESS:

A. He didn't seem angry with me, no.

BY MR. MARKOWSKI:

Q. You say he would hit you hard sometimes on the thigh?

A. Yes.

Q. Did you think it was sexual?

A. Yes.

Q. What caused you to think it was sexual?

A. His actions. It isn't appropriate to touch someone who doesn't want to be touched and he would slap my thigh and think it was funny.

Q. And you said he also would slap you on the ass?

A. Yes.

Q. How often would that happen?

A. Two or three times a week.

Q. Was that similar to the slaps on the thigh?

A. Yes.

Q. Were there any other occasions where he touched you in a way that you considered to be sexual?

A. I was getting out of the truck one day [86]and he grabbed me around the waist and helped me down, made reference to sliding down his pole.

Q. On that occasion he touched you around the waist?

A. Yes.

Q. Did that happen once?

A. He pulled me to him more than once, but getting out of the truck once.

Q. Were there any other occasions that you considered him to have touched you in a sexual way?

A. I had asked him one time after he had smacked me on the forehead if I were a man would he continue touching me and he said no.

Q. My question was were there any other occasions where he touched you in a way that you considered to be sexual?

A. Yes.

Q. What else?

A. Any time he touched me I considered it that way, especially after I asked him if I were a man, would you do this?

Q. Other than the things you described, were there other occasions where Mr. Standridge [87]touched you in what you considered to be a sexual way?

A. Because I had told him from the beginning I did not and would not want a relationship from him, any time he touched me it was unwelcome.

Q. What I'm trying to find out is when that happened, other than the situations that you described?

A. It happened on a daily basis.

Q. In what way?

A. In what ways? Let's see, the top bunk wouldn't work and so he would climb in bed while I was back there sleeping.

Q. How often did that happen?

A. Four, five times and I would get up.

Q. Anything else?

A When we went to get the hotel room because the truck broke down he told them he only needed one bed. I considered it sexually harassing that he would expect me to sleep in a hotel room with him. He told me the company would not provide for more than one room and at the time I did not know any better and I told the clerk [88]that we needed two beds. At a truck stop—

Q. And that's what happened then?

A. Yes. We got two beds, but I've since learned that I should not have had to sleep with him in the same room, not in the hotel room. And in a truck stop, there was references to showering together and I did not know at the time how showering worked and luckily the very first clerk said would you like a shower room of your own and I said yes, I would, and after that I got my own shower room. I always got my own shower room.

Q. You never shared a shower room with Mr. Standridge?

A. No, but he told me I would have to but I never had to. I was prepared not to shower for 28 days.

Q. We're trying to go through occasions where you say he touched you in what you considered to be a sexual way.

Other than what you've described, is there anything else?

A. No.

Q. How quickly after you got on the truck with Mr. Standridge did you consider there to be [89]problems?

A. Within a few days he told me that he wanted — he didn't want me to drive his truck. He didn't want to teach me to drive his truck. He wanted a wife and a log book on the truck and I told him he could have my log book, and other than that, I was there to learn how to drive the truck and that was it.

***

[125]Q. How big is Jason Standridge?

A. He had told me that he used to be a amateur professional wrestler. He towered over me and weighed well over 300 pounds.

Q. Tell me tell us what happened exactly between you and Jason Standridge on your last day on the truck with him or the day you called Sherry Cook?

A. I was trying to pack up my things because it was going to be time to go home and we were close to Michigan

being in Wisconsin. He grabbed a hold of my leg. I was up on the stairs to the upper bunk getting a coat, grabbed a hold of my leg and pulled me down and into his chest and he put his arms around me, pulled me to him putting his hands on my rear end, my bottom and getting in my face and he had told me that he wanted to have sex with me and that no one had ever turned him down.

Q. He told you that at this time after he pulled you down on the ladder?

A. Yes, violently pulled me down because it left his hand print on my leg.

Q. And you say he pulled you close to him [126]by pulling in your bottom; is that right?

A. Uh-huh.

MR. MARKOWSKI: Objection. Leading.

BY MS. SZROMBA:

Q. What was the — you are touching his chest and touching his genitals with his body?

A: My whole body was against.

MR. MARKOWSKI: Excuse me. Objection.

Objection, leading.

BY THE WITNESS:

A. My whole body was against his body.

BY MS. SZROMBA:

Q. And then what happened?

A. I wiggled out of his hands and I got out of the truck.

Q. And I think you testified that he you made your phone calls; is that correct?

A. Yes.

Q. What was Sherry Cook's response to your call? What did she say to you when you told her what happened?

A. She told me that she would make some phone calls and that she'll call me right back.

Q. And what did — did she call you back?

[127]A. Yes.

Q. What did she tell you when she called you back?

A. That they were going to send me by bus, that he was going to be instructed to take me to the bus station.

Q. Sherry Cook told you that Jason would be driving you to the bus station?

A. Yes.

Q. How did you, in fact, get to the bus station?

A. Jason drove me in the semi truck to the bus station.

Q. Did Sherry suggest to you that you could take a cab or go any other way to the bus station?

A. Nothing was suggested. It was just nonchalant he'll drive me there.

Q. How did you feel getting back on the truck with Jason after that?

A. I was nervous about it, but I didn't know what else to do. They said that the bus was leaving at this time and I needed to be there.

***

[129]Q. So did anyone ever tell you that you don't — that the company will pay for two rooms if you and your co-driver are different sexes?

A. Is what you're told when the situation occurs when the truck breaks down that they will spend a certain amount of money, it's usually about a hundred dollars per night for a room and if you can find two rooms for 50 bucks or less, you can get two rooms, if not, they want you to room together.

Q. Did you — at your orientation for CRST had you heard about any problems that any female drivers had working there?

A. We were always talking about horror stories about women being raped, women getting together with their lead drivers and then being disappointed because the lead driver went home and being abused, left. They were always talking about someone being left alongside the road in a truck stop or in a rest area.

Q. Were these stories being told by students or trainers or who was talking about [130]these things?

MR. MARKOWSKI: Object to lack of foundation.

BY THE WITNESS:

A. It was students talked about it. They were talking about what they had heard. When other drivers came in you didn't know if they were a lead driver or not. They would just say that they were a driver and they would talk about it. I had heard a driver say he had left somebody alongside the road.

BY MS. SZROMBA:

Q. Did you get the sense at any time about what the company's view of employees who wanted to change drivers frequently?

MR. MARKOWSKI: Object to the form of the question.

BY THE WITNESS:

A. After a while, it became apparent that you were kind of dubbed a bad co-driver if you needed to change a lot.

BY MS. SZROMBA:

Q. What gave you that impression?

MR. MARKOWSKI: Same objection.

BY THE WITNESS:

[131]A. I was told that I needed to be able to keep a co-driver to keep my job.

BY MS. SZROMBA:

Q. Who told you that?

A. Jeff, a dispatcher.

Q. Approximately when did you hear this from Jeff?

A. I'd been with the company over a year, around a year. I had gone through quite a few co-drivers.

Q. When Jeff told you this, did he have a conversation with you about why you might have had several co-drivers in your career with CRSTI?

MR. MARKOWSKI: Object to the form of the question.

BY THE WITNESS:

A. No.

BY MS. SZROMBA:

Q. Did he ask you if you were having particular problems with co-drivers?

MR. MARKOWSKI: Same objection.

BY THE WITNESS:

A. No.

BY MS. SZROMBA:

[132]Q. Did you ever complain to your dispatcher about your problems with Jason?

A. I had talked to Livi about it.

Q. How many times did you talk to Livi about it?

A. Twice.

Q. When was the first time approximately?

A. Within the first week.

Q. Do you remember where you were, what location, city?

A. I believe it was between Arizona and California, somewhere in that time frame.

Q. Was there something that happened that caused you to call him at that time?

A. We're told to call them and tell them how it's going and everything and I told him that he was slapping my ass and stuff and it was annoying for me to have this person touching me, but I felt like it was just a joke to everybody else.

Q. You felt it was a joke to who?

MR. MARKOWSKI: Object to the form of the question.

BY THE WITNESS:

[133]A. To Livi.

BY MS. SZROMBA:

Q. You said you told him in this first call that Jason was slapping your ass; is that right?

A. Uh-huh.

Q. What else did you tell him, if anything that was —

A. I told him the bunk didn't work and he said that you have to get into a terminal and have that looked at.

Q. What made you think the bunk didn't work?

A. I was told it didn't work.

Q. Who told you it didn't work?

A. Jason.

Q. Did you ever find out what the problem with the bunk was?

A. He used the catch release as a coat rack.

Q. So, it, in fact, wasn't broken?

A. It was not broken at all.

Q. So you told Livi in this first call about the bunk, about Jason slapping your ass, [134]anything else that you remember telling Livi?

A. I don't recall anything.

Q. What do you recall Livi's response was, and by Livi, we all understand you mean Livingston; is that right?

A. Yes.

Q. What was Livingston's response, if any?

A. That we'd have to get the bunk fixed at a terminal and he really didn't say much except, you know, he felt that — I felt that he felt that it was just in play, all in good play.

Q. What made you think that that was his view of it?

A. Because it was kind of ignored, put aside.

Q. He didn't follow up on the phone call about it?

A. No.

MR. MARKOWSKI: Objection. Leading.

BY MS. SZROMBA:

Q. When was the next time you called Livingston about Jason?

A. I believe it was on the way to Wisconsin.

[135]Q. Which was your last trip with Jason?

A. Yes.

Q. What caused you to call Livingston at that time?

Appendix CC

A. Everything was still continuing. He was continuing to slap me and he'd gotten — it's in the letter that he went by his home and gotten a dog and the dog was causing problems and so I contacted him then.

****

APPENDIX DD — AMENDED ANSWER AND AFFIRMATIVE DEFENSES OF CRST, IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, FILED MAY 1, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRIC T OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

CRST VAN EXPEDITED, INC.,

Defendants.

AMENDED ANSWER AND AFFIRMATIVE DEFENSES

Defendant CRST Van Expedited, Inc. ("CRST"), by its attorneys, amends its answer to Plaintiff's First Amended Complaint as follows:

"Nature of the Action" paragraph - CRST admits that the First Amended Complaint purports to assert claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981

on behalf of Monica Starke and others. CRST denies the remaining allegations of this paragraph.

1. CRST admits that the Plaintiff purports to invoke this Court's jurisdiction under 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345 and purports to bring this action pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. CRST denies the remaining allegations of Paragraph 1, including any inference that it has violated any of these statutes or that Plaintiff is entitled to any relief.

2. CRST denies the allegations of Paragraph 2.

3. CRST admits the allegations of Paragraph 3.

4. CRST admits the allegations of Paragraph 4.

5. CRST admits the allegations of Paragraph 5.

6. CRST admits the allegations of the first sentence of Paragraph 6. CRST denies the remaining allegations of Paragraph 6.

7. CRST denies the allegations of Paragraph 7.

8. CRST denies the allegations of Paragraph 8.

9. CRST denies the allegations of Paragraph 9.

10. CRST denies the allegations of Paragraph 10.

Appendix DD

11. CRST denies the allegations of Paragraph 11.

ADDITIONAL AND AFFIRMATIVE DEFENSES

Without assuming the burden of proof with respect to any issue or matter when the burden of proof would otherwise be on the Plaintiff, CRST asserts the following defenses:

1. CRST took reasonable care to prevent and correct unlawful harassment, and Monica Starke and similarly situated female employees failed to take advantage of corrective opportunities or otherwise to avoid harm, if any.

2. Monica Starke and similarly situated female employees have failed to mitigate their damages, if any.

3. To the extent some or all of the acts complained of involve conduct outside of a CRST workplace or outside of CRST working time, CRST has no legal responsibility for such personal activities.

4. Plaintiff's claims are barred to the extent they are untimely.

5. Plaintiff's claims are barred to the extent an individual on whose behalf it purports to act failed to exhaust available administrative remedies.

6. Plaintiff's claims for punitive damages are barred by CRST's good faith efforts to comply with applicable law.

7. Plaintiff's claims are barred to the extent they were waived and/or released.

Appendix DD

WHEREFORE, Defendant CRST respectfully requests that this Court enter judgment in its favor dismissing with prejudice Plaintiff's First Amended Complaint and award CRST such other and further relief as the Court may deem appropriate.

Respectfully submitted,

CRST VAN EXPEDITED, INC.

By: /s/ Robert A. Markowski
One of its attorneys

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APPENDIX EE— ANSWER AND AFFIRMATIVE DEFENSES OF CRST, IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, FILED NOVEMBER 30, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

CRST VAN EXPEDITED, INC.,

Defendants.

ANSWER AND AFFIRMATIVE DEFENSES

Defendant CRST Van Expedited, Inc. ("CRST"), by its attorneys, answers Plaintiff's First Amended Complaint as follows:

"Nature of the Action" paragraph - CRST admits that the First Amended Complaint purports to assert claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981 on behalf of Monica Starke and others. CRST denies the remaining allegations of this paragraph.

Appendix EE

1. CRST admits that the Plaintiff purports to invoke this Court's jurisdiction under 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345 and purports to bring this action pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. CRST denies the remaining allegations of Paragraph 1, including any inference that it has violated any of these statutes or that Plaintiff is entitled to any relief.

2. CRST denies the allegations of Paragraph 2.

3. CRST admits the allegations of Paragraph 3.

4. CRST admits the allegations of Paragraph 4.

5. CRST admits the allegations of Paragraph 5.

6. CRST admits the allegations of the first sentence of Paragraph 6. CRST denies the remaining allegations of Paragraph 6.

7. CRST denies the allegations of Paragraph 7.

8. CRST denies the allegations of Paragraph 8.

9. CRST denies the allegations of Paragraph 9.

10. CRST denies the allegations of Paragraph 10.

11. CRST denies the allegations of Paragraph 11.

Appendix EE

ADDITIONAL AND AFFIRMATIVE DEFENSES

Without assuming the burden of proof with respect to any issue or matter when the burden of proof would otherwise be on the Plaintiff, CRST asserts the following defenses:

1. CRST took reasonable care to prevent and correct unlawful harassment, and Monica Starke and similarly situated female employees failed to take advantage of corrective opportunities or otherwise to avoid harm, if any.

2. Monica Starke and similarly situated female employees have failed to mitigate their damages, if any.

3. To the extent some or all of the acts complained of involve conduct outside of a CRST workplace or outside of CRST working time, CRST has no legal responsibility for such personal activities.

4. Plaintiff's claims are barred to the extent they are untimely.

5. Plaintiff's claims are barred to the extent an individual on whose behalf it purports to act failed to exhaust available administrative remedies.

6. Plaintiff's claims for punitive damages are barred by CRST's good faith efforts to comply with applicable law.

Appendix EE

WHEREFORE, Defendant CRST respectfully requests that this Court enter judgment in its favor dismissing with prejudice Plaintiff's First Amended Complaint and award CRST such other and further relief as the Court may deem appropriate.

CRST VAN EXPEDITED, INC.

By: /s/_____

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Thomas D. Wolle AT0008564
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Facsimile: (312) 840-7317
E-mail: jmathias@jenner.com

Appendix EE

I hereby certify that on November 30, 2007, I electronically filed the foregoing Answer and Affirmative Defenses with the Clerk of Court using the ECF system which will send notification of such filing to the following:

Brian C. Tyndall
Senior Trial Attorney
Equal Employment Opportunity Commission
Milwaukee Area Office
310 West Wisconsin Avenue, Suite 800
Milwaukee, WI 53203-2292
Brian.tyndall@eeoc.gov

/s/ Deanna Wilson
Deanna Wilson, Secretary

APPENDIX FF — FIRST AMENDED COMPLAINT, IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, FILED NOVEMBER 16, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-cv-00095-LRR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

CRST VAN EXPEDITED, INC.,

Defendant.

FIRST AMENDED COMPLAINT

Jury Trial Demand

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a to correct unlawful employment practices on the basis of sex, and to provide appropriate relief to Monika Starke and a class of similarly situated female employees

of defendant CRST Van Expedited, Inc. ("CRST") who were adversely affected by such practices. Ms. Starke and a class of similarly situated female employees were adversely affected by such practices when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them from the harassment and hostile working environment.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The unlawful employment practices alleged were committed in substantial part within the jurisdiction of the United States District Court for the Northern District of Iowa.

PARTIES

3. The plaintiff, the Equal Employment Opportunity Commission ("EEOC"), is the agency of the United States of America charged with administering, interpreting, and enforcing Title VII, and is expressly authorized to bring this action by Section 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times, the defendant CRST was an Iowa corporation doing business in the Cedar Rapids, Iowa and elsewhere, and continuously had at least 15 employees.

5. At all relevant times, CRST has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g), and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g), and (h).

STATEMENT OF CLAIMS

6. More than 30 days prior to the institution of this lawsuit, Monika Starke, then a CRST employee, filed a charge with the EEOC alleging violations of Title VII by CRST. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e-2 and 2000e-3. Among other things, two of its lead drivers subjected Starke to sexual harassment during their supervision of Starke (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile environment, culminating in her discharge from employment with CRST.

Appendix FF

8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.

9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive Starke and a class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

10. The unlawful employment practices complained of in Paragraphs 7 and 8 above were intentional.

11. The unlawful employment practices complained of in Paragraphs 7 and 8 above were done with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees.

Appendix FF

PRAYER FOR RELIEF

WHEREFORE, EEOC respectfully requests that this Court:

A. Grant a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment, any other employment practice which discriminates on the basis of sex.

B. Order CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices.

C. Order CRST to make Starke and the class of similarly situated female employees whole by providing appropriate backpay and benefits, with pre-judgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including frontpay and/or reinstatement.

D. Order CRST to make Starke and the class of similarly situated female employees whole by providing compensation for past and future pecuniary and nonpecuniary losses resulting from the unlawful practices described in Paragraphs 7 and 8 above, including (but not limited to) emotional pain, suffering, and humiliation, in amounts to be determined at trial.

E. Order CRST to pay Starke and the class of similarly situated female employees punitive damages for CRST's malicious and reckless conduct described in Paragraphs 7 and 8 above, in amounts to be determined at trial.

F. Grant such further relief as the Court deems necessary and proper in the public interest.

G. Award EEOC its costs of this action.

JURY TRIAL DEMAND

EEOC requests a jury trial on all questions of fact raised by its complaint.

Date: November 16, 2007.

Ronald S. Cooper
General Counsel

James Lee
Deputy General Counsel

Gwendolyn Young Reams
Associate General Counsel

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 "L" Street, N.W.
Washington, D.C. 20507

Appendix FF

Dated: November 16, 2007 /s/ John C. Hendrickson
John C. Hendrickson
Regional Attorney

Dated: November 16, 2007 /s/ Jean P. Kamp
Jean P. Kamp
Associate Regional
Attorney

Dated: November 16, 2007 /s/ Brian C. Tyndall
Brian C. Tyndall
Senior Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Milwaukee Area Office
310 West Wisconsin Avenue -
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TDD (414) 297-1115

N:CRST-complaint-first-amended.11-16-07

Appendix FF

CERTIFICATE OF SERVICE

I, Brian C. Tyndall, hereby certify that on November 16, 2007, I caused the foregoing document to be served by email and first class mail to:

Robert T. Markowski, Esq.
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-2736
Fax (312) 840-7736
RMarkowski@jenner.com

Thomas D. Wolle, Esq.
Moyer & Bergman, P.L.C.
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Cedar Rapids, IA 52406-1943
Tel (319) 366-7331
Fax (319) 366-3668

APPENDIX GG — DETERMINATION LETTER OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (PEEPLES), DATED SEPTEMBER 27, 2007

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Milwaukee Area Office

Charge Number: 26A-2006-00561C
FEPA Number: 03-06-51294

REMCEY PEEPLES
1183 VZCR 3832
Wills Point, TX 75169

Charging Party,

vs.

CRST INTERNATIONAL, INC.
Attn: James T. Barnes
3930 16th Avenue SW
Cedar Rapids, IA 52404

Respondent.

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964.

The Respondent is an employer within the meaning of Title VII and all requirements for coverage have been met.

Appendix GG

Charging Party alleged that she was discriminated against in violation of Title VII in that she was subjected to sexual harassment on the basis of her gender, female, and then subjected to disctriminatory terms and conditions of employment and discharged on the basis of retaliation in violation of Section 704(a) of Title VII.

I have considered all the evidence disclosed during the investigation and find that there is reasonable cause to believe that there is a violation of Title VII of the Civil Rights Act of 1964, as amended, including Section 704(a) in that the Respondent subjected the charging party to sexual harassment on the basis of her gender and then subjected her to discriminatory terms and conditions of employment and discharge on the basis of retaliation. In addition, I find that there is reasonable cause to believe that the Respondent has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.

This determination is final. When the Commission finds that violations have occurred, it attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, I invite the parties to join with the Commission in reaching a just resolution of this matter. Disclosure of information obtained by the Commission during the conciliation process will be made only in accordance with the Commission's Procedural Regulations (29 CPR Part 1601.26).

If the Respondent wishes to accept this invitation to participate in conciliation efforts, it may do so at this

time by proposing terms for a conciliation agreement. That agreement should be provided to the Commission representative within (14) days of the date of this determination. The remedies for violations of the statutes we enforce are designed to make the identified victims whole, and to provide corrective and preventative relief. These remedies may include, as appropriate, an agreement by the Respondent not to engage in unlawful employment practices, placement of identified victims in positions they would have held but for discriminatory actions, back pay, restoration of lost benefits, injunctive relief, compensatory and/or punitive damages, and notice to employees of the violation(s) and the resolution of the claim.

Should the Respondent have further questions regarding the conciliation process or the conciliation terms it would like to propose, we encourage it to contact the assigned Commission representative. Should there be no response from the Respondent within (14) days, we may conclude that further conciliation efforts in this matter would be futile or non-productive.

On behalf of the Commission:

Sept 27, 2007
Date

/s/
John P. Rowe
District Director

cc: Matt J. Reilly
c/o White & Johnson, P.C.
Box 5878
Cedar Rapids, IA 52406

APPENDIX HH— COMPLAINT, IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, FILED SEPTEMBER 27, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Case No. 1:07-CV-95

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

CRST VAN EXPEDITED, INC.,

Defendants.

COMPLAINT

Jury Trial Demand

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a to correct unlawful employment practices on the basis of sex and retaliation, and to provide appropriate

relief to Monika Starke and a class of similarly situated female employees of defendant CRST Van Expedited, Inc. ("CRST") who were adversely affected by such practices. Ms. Starke and a class of similarly situated female employees were adversely affected by such practices when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them from the harassment and hostile working environment.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The unlawful employment practices alleged were committed in substantial part within the jurisdiction of the United States District Court for the Northern District of Iowa.

PARTIES

3. The plaintiff, the Equal Employment Opportunity Commission ("EEOC"), is the agency of the United States of America charged with administering, interpreting, and enforcing Title VII, and is expressly authorized to bring

this action by Section 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times, the defendant CRST was an Iowa corporation doing business in the Cedar Rapids, Iowa and elsewhere, and continuously had at least 15 employees.

5. At all relevant times, CRST has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g), and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g), and (h).

STATEMENT OF CLAIMS

6. More than 30 days prior to the institution of this lawsuit, Monika Starke, then a CRST employee, filed a charge with the EEOC alleging violations of Title VII by CRST. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e-2 and 2000e-3. Among other things, two of its lead drivers subjected Starke to sexual harassment during their supervision of Starke (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent,

correct, and protect Starke from the harassment and the hostile environment, culminating in her discharge from employment with CRST.

8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.

9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive Starke and a class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

10. The unlawful employment practices complained of in Paragraphs 7 and 8 above were intentional.

11. The unlawful employment practices complained of in Paragraphs 7 and 8 above were done with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees.

Appendix HH

PRAYER FOR RELIEF

WHEREFORE, EEOC respectfully requests that this Court:

A. Grant a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment, any other employment practice which discriminates on the basis of sex.

B. Order CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices.

C. Order CRST to make Starke and the class of similarly situated female employees whole by providing appropriate backpay and benefits, with pre-judgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including frontpay and/or reinstatement.

D. Order CRST to make Starke and the class of similarly situated female employees whole by providing compensation for past and future pecuniary and nonpecuniary losses resulting from the unlawful practices described in Paragraphs 7 and 8 above, including (but not limited to) emotional pain, suffering, and humiliation, in amounts to be determined at trial.

Appendix HH

E. Order CRST to pay Starke and the class of similarly situated female employees punitive damages for CRST's malicious and reckless conduct described in Paragraphs 7 and 8 above, in amounts to be determined at trial.

F. Grant such further relief as the Court deems necessary and proper in the public interest.

G. Award EEOC its costs of this action.

JURY TRIAL DEMAND

EEOC requests a jury trial on all questions of fact raised by its complaint.

Date: September 27, 2007.

Ronald S. Cooper
General Counsel

James Lee
Deputy General Counsel

Gwendolyn Young Reams
Associate General Counsel

EQUAL EMPLOYMENT
OPPORTUNITY
COMMISSION
1801 "L" Street, N.W.
Washington, D.C. 20507

Appendix HH

Dated: September 27, 2007 s/John C. Hendrickson
John C. Hendrickson
Regional Attorney

Dated: September 27, 2007 s/Jean P. Kamp
Jean P. Kamp
Associate Regional
Attorney

Dated: September 27, 2007 s/Brian C. Tyndall
Brian C. Tyndall
Senior Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY
COMMISSION
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Milwaukee, WI 53203-2292
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APPENDIX II — DETERMINATION LETTER OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (STARKE), DATED JULY 12, 2007

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Milwaukee Area Office

Charge Number: 260-2005-06856C
FEPA Number: 12-05-50880

MONIKA STARKE,

Charging Party,

VS.

CRST INTERNATIONAL, INC.
Attn: James T. Barnes
3930 16th Avenue SW
Cedar Rapids, IA 52404,

Respondent.

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964.

The Respondent is an employer within the meaning of Title VII and all requirements for coverage have been met.

Appendix II

Charging Party alleged that she was discriminated against in violation of Title VII in that she was subjected to sexual harassment on the basis of her gender, female.

I have considered all the evidence disclosed during the investigation and find that there is reasonable cause to believe that there is a violation of Title VII of the Civil Rights Act of 1964, as amended, in that the Respondent subjected the charging party to sexual harassment on the basis of her gender. In addition, I find that there is reasonable cause to believe that the Respondent has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.

Like and related to the charge, I have determined that the evidence obtained during the investigation establishes reasonable cause to believe that there is a violation of Title VII of the Civil Rights Act of 1964, as amended, in that the Respondent discharged the Charging Party and attempted to collect money from the Charging Party on the basis of retaliation in violation of Section 704(a) of Title VII.

This determination is final. When the Commission finds that violations have occurred, it attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, I invite the parties to join with the Commission in reaching a just resolution of this matter. Disclosure of information obtained by the Commission during the conciliation process will be made only in accordance with the Commission's Procedural Regulations (29 CPR Part 1601.26).

Appendix II

If the Respondent wishes to accept this invitation to participate in conciliation efforts, it may do so at this time by proposing terms for a conciliation agreement. That agreement should be provided to the Commission representative within (14) days of the date of this determination. The remedies for violations of the statutes we enforce are designed to make the identified victims whole, and to provide corrective and preventative relief. These remedies may include, as appropriate, an agreement by the Respondent not to engage in unlawful employment practices, placement of identified victims in positions they would have held but for discriminatory actions, back pay, restoration of lost benefits, injunctive relief, compensatory and/or punitive damages, and notice to employees of the violation(s) and the resolution of the claim.

Should the Respondent have further questions regarding the conciliation process or the conciliation terms it would like to propose, we encourage it to contact the assigned Commission representative. Should there be no response from the Respondent within (14) days, we may conclude that further conciliation efforts in this matter would be futile or non-productive.

On behalf of the Commission:

Jul 12, 2007
Date

/s/
John P. Rowe
District Director

APPENDIX JJ — LETTER FROM JAMES T. BARNES TO PAM BLOOMER, DATED JANUARY 19, 2007

January 19, 2007

Equal Opportunity Commission
Ms. Pam Bloomer
310 W. Wisconsin Ave.
Milwaukee, WI 53203

Re: Sexual harassment complaints of Starke and Peeples

Dear Ms. Bloomer:

This letter and the accompanying attachments are offered by CRST International ("CRST") to address the concerns you raised in our recent phone conversation related to the two sexual harassment complaints of Monika Starke and Remcey Peeples. Generally, your concern focused on the conduct of CRST's male lead drivers when they are training female drivers.

Specifically, you stated that it seems the "mentality" is that it is acceptable for male lead drivers to exert power and influence over female students, which may create a hostile work environment for the female drivers. You also expressed concern regarding the number of complaints lodged against CRST based on alleged "sexual favors" that male lead drivers requested of female student drivers.

Role of Lead Driver. Lead drivers, by the very nature of their position, must exercise some degree of authority

over student drivers, irrespective of the gender of the lead driver or the student driver. In order for student drivers to be qualified and have sufficient experience, they must have, generally, twenty-eight (28) days of training with a lead driver. This lead driver/student driver relationship is really no different than the role of supervisors in other industries and organizations. The "lead" is responsible for mentoring and training the "probationary" employee.

Number of Complaints alleging harassment. You stated that the "number" of complaints against CRST alleging sexual harassment is quite high. In fact, the number of complaints is actually quite minimal given the number of employees which CRST employs. The complaints of Ms. Starke and Ms. Peeples were received in December 2005 and January 2006, respectively. From December 2005 through present, CRST Van Expedited has delivered 4,715 loads with a male lead driver and female student. Of this number, there were 595 different "combinations" of male lead driver and female student drivers.

During this same period of time (12/05 through present), CRST's Human Resources Department was made aware of and investigated eight situations in which a female student alleged a male lead driver engaged in sexual harassment. Prompt remedial action designed to end the harassment was taken in each of these instances, and in only one situation did a student driver file an EEOC complaint. In short, by my calculations, only 1.3% of all female students who had a male lead driver had any kind of issue involving alleged sexual harassment.

Appendix JJ

CRST takes sexual harassment seriously. We recognize that lead drivers are perceived by students to be in a position of authority, and also that most often, there will not be any "witnesses" to what happens in the truck other than the two drivers. As a result, we are often unable to verify whether a complaint is "true" or not. What CRST can do, however, is take as many precautions as it can to prevent sexual harassment, and to end sexual harassment if and when it occurs. Accordingly, CRST is proactive in its approach to sexual harassment, and its precautions, procedures and policies include the following:

1. Lead driver training includes a training module regarding CRST's strict policy prohibiting sexual harassment (Exhibit A)
2. During orientation, all prospective employees are informed of CRST's harassment policy, including whom to contact in the event of any such harassment. (Exhibit B)
3. All lead drivers must sign a "Training Violation Policy Acknowledgement" (Exhibit C) and all prospective employees sign an acknowledgement of their understanding of CRST's harassment policy (Exhibit D)
4. All students are informed that they are able to make special requests regarding their training before it begins. I.e., female students may request to be trained by a lead driver of one sex or the other. (Exhibit E)
5. All fleet managers (dispatchers) receive sexual harassment training on how to handle various types of complaints of drivers, including

complaints of harassment. Fleet managers are instructed to immediately offer to remove a student from the harasser (i.e., get a new lead driver), and are further instructed to give the information to Human Resources for prompt investigation and appropriate discipline.

6. Human Resources promptly investigates allegations of harassment and metes out appropriate discipline.
7. Human Resources' investigation of alleged harassment by a lead driver includes contacting other female drivers who have driven with the male lead driver to see whether any prior harassment occurred.

We hope this information alleviates your concerns. We respectfully request that the EEOC find "no probable cause" in these two cases.

Sincerely,

/s/_____
James T. Barnes
Director, Human Resources
CRST, International, Inc.

Supreme Court, U.S.
FILED
JAN 19 2016
OFFICE OF THE CLERK

No. 14-1375

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 19, 2015
CERTIORARI GRANTED DECEMBER 4, 2015

January 19, 2016

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No. 13-3159

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff–Appellant,

v.

CRST VAN EXPEDITED, INC.,

Defendant–Appellee.

On Appeal from the United States District Court
for the Northern District of Iowa
Civil Action No. 07-cv-95-LRR
Hon. Linda R. Reade, U.S.D.J., presiding

ADDENDUM TO OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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REDACTED

POSITIVE WORK ENVIRONMENT COMMUNICATION

12/14/2004	[redacted]		2497	8/25/2005	22	C	[redacted]	2010	12/18/2004	18	vw
12/15/2004	Denise	Phoenix	3288	1/17/2005	7	C	Joseph Klobbe	1058	9/26/2006	18	vw
1/4/2005	[redacted]		1884	1/1/2005	8	C	[redacted]	7575	2/16/2005	21	vw
[redacted]												
1/12/2006	Amanda	Walton	4209	1/4/2005	8	C	Larry Redmond	3305	4/27/2006	21	vw
1/18/2006	Kristen	De Jonnette	2949	7/30/2005	2	C	Glenn Nazare	1144	10/10/2006	7	vw
1/21/2006	Rose	Sargent	4819	6/25/2006	3	L	Kenneth Osborn	P079	8/13/2005	2	vw
1/28/2006	[redacted]		5386	3/8/2006	11	L	[redacted]	270C	8/21/2007	12	vw
2/14/2003	Pamela	Brooks	5477	2/27/2005	7	C	Timothy Shelb	0911	11/2/2006	43	vw
[redacted]												
3/7/2005	[redacted]		6388	3/7/2005	8		[redacted]	V074	8/6/2007	22	vw, nl
3/15/2005	Victoria	Strong	Z829			C	Dan Miller	1113	5/3/2005	8	vw
3/17/2005	[redacted]		V372	3/4/2006	15	C	[redacted]	W058	4/21/2005	32	vw, letters sent to all parties
3/18/2005	[redacted]		W139	3/17/2005	8	C	[redacted]	W058	4/21/2005	32	vw
4/4/2005	Tammy	Williams	7434	4/1/2005	8	L	Ivan Wolfe	Y645	9/30/2005	18	vw
4/25/2005	Valerie	Moriaye	7183	5/8/2006	7		Zel Adams	7230	3/23/2006	1	vw
5/3/2005	Victoria	High	D335	8/10/2006	22	L	Ronald Ilson	811F	3/17/2006	28	vw, nl
5/12/2005	Paula	Sandeldecker	7808	10/24/2005	2	C	Eulas Baker	6817	8/23/2006	43	vw
5/12/2005	Jennifer	Sussan	7795	9/8/2006	5	L	Roy Handy	2739	11/15/2005	27	vw
5/15/2005	Tamara	Thiel	6410	8/1/2006	5		Spencer Cliffo	4035	8/4/2005	4	dl, sexc complaint
5/27/2006	Laura	Anthony	B223	5/18/2005	4	L	Robert Thomas	4371	12/4/2006	8	vw, nl
6/1/2006	Victoria	Johnson	A119	2/4/2006	15	L	Willie Phillips	6094			vw, nl - reinstated after 6 months
6/3/2006	Stefanie	Beal	O105	8/20/2005	7	L	Charles Langmire	A794	12/22/2005	6	vw, nl
6/7/2006	Karen	Sears	7691	6/11/2006	11		John Wilson	6443	6/6/2006	11	vw, nl
6/17/2006	Martha	Griffin	R088	8/24/2005	11	L	Andy Pour	W387	8/27/2006	21	vw
7/7/2006	Nadia	Fregoso	8812	4/4/2006	7	L	Mamdouh Hassanin	7787	7/28/2006	4	vw
7/13/2006	Christine	Taylor	A807	10/24/2006	11	C	Charles Young	8356	7/28/2005	8	vw
7/18/2006	Monika	Baska	A192	7/14/2005	7		Bobb Smith	R270	8/12/2005	18	vw, nl
8/4/2005	Catherine	Blevins	A351	8/5/2005	18	L	William Bircher	A538	11/23/2006	1	vw, nl
8/11/2005	Tequila	Jacason	7871	8/1/2006	22	L	Leon Smith	F034	11/23/2007	16	vw
8/15/2006	Sherry	McDowell	7804	8/8/2006	3	C	Darryl Burks	7048	8/26/2005	7	vw
8/18/2005	Remcey	Lassiter	A917	9/20/2005	6		Robert Stanley	4192	2/23/2007	11	vw
[redacted]												
8/25/2005	Stephanie	Matthews	B028	10/14/2005	5	L	Ibre Beck	8098			vw, nl
8/26/2005	Sherry	Halley	A568	10/2/2005	11	C	Gregory Taber	0938	8/8/2006	8	vl
8/26/2005	Victoria	Johnson	A119	2/4/2006	16		Unknown - attacked in parking lot				dl
8/26/2005	Trevina	Scott	8091	8/16/2005	21	L	Larry Patterson	2683	8/26/2006	7	dl
8/26/2005	Trevina	Stevens	7783	8/21/2006	7	C	Glenroy Ferguson	C149			dl
8/27/2005	Monika	Sapka	A192	7/14/2005	7		David Goodman	0047	8/30/2005	22	vw, nl
10/3/2005	Kimberly	Reed	B549	10/3/2005	4	L	Charles Mitchell	B406	4/4/2006	22	vw, nl
10/10/2006	Jonny	Ayers	B803	8/13/2007	5	L	Fernando Rimenac	B278			vw, nl
10/10/2006	[redacted]		2324	8/28/2006	15	C	[redacted]	B272	10/6/2005	18	l
10/21/2005	Nicole	Edwards	S028	10/20/2006	35	C	Kevin Johnson	Y990	10/13/2006	3	vw
[redacted]												
10/27/2005	Donna	Schanach	B707	10/31/2006	1	C	Manuel Reese	7885	3/27/2006	18	vw
11/3/2005	Julie	Crevalho	C110	12/1706	7	L	Jim Mahmen	X196	7/18/2006	43	vw, nl
11/3/2006	Rebecca	Semrow	C740	7/1/2006	1	L	Mamdou Diop	B284	7/28/2006	4	vw, nl
11/4/2005	Virginia	Vargas	C304	1/1/2006	11	L	Kevin Somerville	8287	2/13/2006	35	vw, nl
11/4/2005	[redacted]		B228	2/1/2006	7	C	[redacted]	B229	8/2/2006	55	vw
11/8/2005	[redacted]		O317	4/25/2006	3	C	[redacted]	0529	12/6/2005	23	vw
11/11/2006	[redacted]		B621	12/11/2006	11	C	[redacted]	0312	3/13/2006	55	vw, nl
11/18/2005	Shalina	Rose	7933	6/4/2006	7	C	Chucks Ugwu	8656	7/30/2006	1	vw
11/23/2005	Denise	Desomier	D127	12/8/2006	1	L	Brian Mallory	8353	11/30/2005	11	l
12/1/2005	[redacted]		7346	7/10/2006	5		[redacted]				dl
12/5/2005	Kelsey	Gates	D740	2/13/2007	7	L	Frank Bive	D787			vw, nl
12/16/2005	Tonya	Mallwig	C830	7/7/2006	43		David Moss	F228	3/27/2007	41	vw, nl
1/6/2006	[redacted]		8943	3/24/2006	5	C	[redacted]	A858	8/31/2006	43	vw
1/12/2006	Tammy	Cornutt	A788	2/18/2006	2	C	Michael Baines	Y839	2/12/2006	4	vw
1/31/2006	Dorothy	Davis	D750	7/3/2006	7	C	Michael Lemer	7127	6/18/2006	2	vw, nl

SA2

Date	Employee		ID	Complaint	Days Open		Party Of	Job	Interview	Days	Comments
2/14/2006	Tessa	Medley	E339	8/7/2007	32	C	Clifford Brown	E264	10/5/2006	1	vw, nl
3/8/2006	Cathy	Shaw	1208	3/15/2006	11		Larry Patterson	Z583	8/26/2006	7	nl
4/24/2006	Lisa	Rodriguez	D287	2/8/2007	11	C	Hermes Cardenas	8820	4/15/2006		I
5/22/2006	Tracy	Tuttle	9404			L	Jason Standridge	8901	7/19/2006	8	vw, nl
8/30/2006	[redacted]		A803	5/26/2006	7		[redacted]	A369	8/17/2006	28	vw
7/17/2006	Tanya	Cox	8092	7/14/2006	2	L	Kurtis Thurmon	D610	7/15/2006	43	dl, left prior to complaint
7/24/2006	Stephanie	Hooper	8815	7/31/2006	18	C	David Ladd	A834	8/26/2006	27	nl
7/25/2006	Betsy	Valera	E747	8/2/2006	4	L	Scott Lockamy	M067			vw,nl
8/3/2006	Connie	Fauss	D484	8/17/2006	7		Ollie Branyon	D234	9/7/2006	11	dl
8/10/2006	Tracy	Taylor	F433	8/27/2006	8	L	Robert Yipe	4580	8/14/2006	1	
8/16/2006	Gail	Morgan	E429	4/14/2007	7	C	John Bilgen	G111	5/8/2007	3	dl
8/18/2006	[redacted]		E884	10/3/2006	58	L	[redacted]	A357	8/8/2006	55	vw
8/27/2006	Lora	Page	H485	1/17/2008	7	L	Joe Wallace	8293	6/23/2007	43	vw, nl
9/8/2006	Gloria	South	G787	9/7/2006	7	L	Mark Garrett	Y444	11/27/2006	43	vw, nl
10/3/2006	Amy	Lutes	F181			C	Jerry Newman	6335	12/23/2006	8	vw, nl
10/4/2006	Sylvia	Fichtner	2657	10/26/2006	7	C	Andy Sommer - Student		DNS		dl
10/25/2006	[redacted]		833A				[redacted]				I
10/31/2006	Sylvia	Fichtner	2887	10/26/2006	7	C	William Shallik	8401	11/16/2007	43	vw, nl
11/8/2006	Antoinett	Baldwin	I330	11/3/2006	7	L	Stephen Peers	3025	11/10/2006	43	vw, nl
11/13/2006	Joanne	Carney	G864	4/26/2007	4	C	Steven Johnson	H378	4/2/2007	18	vw, nl
11/13/2006	Juanita	Rojas Perez	F713	2/4/2007	31	C	Oscar Lopez	8566	10/4/2007	11	vw, nl
11/27/2006	Mirko	Cook	F898	4/4/2007	8	C	Steven Johnson	H378	1/30/2007	8	vw, nl
12/15/2006	Latasha	Thomas	I881	12/14/2006	7	L	Donald Brown	D848	1/8/2007	11	
12/22/2006	Michelle	Schudder	K233	11/4/2007	43	C	Irwin Harris	9772	10/4/2007	11	vw
1/18/2007	Eben	Marley	C099			C	Kenneth Carmichael	517K			vw, nl
1/23/2007	Mary	Smith	K323	8/28/2008	18	L	Warren Mason	8453	4/20/2007	55	vw, nl
1/26/2007	Angela	Cooper	K251	9/17/2007	3	L	Michael Lewis	0981	3/20/2006	28	vw, nl
1/28/2007	Theresa	Fetzer	K053	4/7/2007	4	L	John Federigzi	H066			Vw, nl
2/28/2007	Margaret	Rice	158A	3/30/2007	28	L	Robert Gross	8048	4/27/2006	12	vw, nl
3/13/2007	Danielle	Quintanilla	374A	8/28/2007	11	L	Michael Kerns	0707	3/23/2007	35	vw, nl (except Michelle Riggs)
3/16/2007	Sherry	O'Donnell	K371	8/8/2007	21	C	Anthony Beam	885C	8/13/2007	8	vw, nl
3/28/2007	Jasmine	Reed	M76	7/22/2007	35	C	Steve Vansour	L848	7/1/2007	18	vw, nl
3/28/2007	[redacted]		833A			C	[redacted]	882A			vw
4/5/2007	Darleane	Reese	C084	4/11/2007	7	C	Earnest Gorham	I138	4/5/2007	18	I
4/9/2007	Kathy	Cannales	712A	8/28/2007	8	L	Warren Walker	C283			vw, nl
4/9/2007	Jonne	Shepler	L481	4/7/2007	12	L	Alex Alston & John Kewley	4520 & 8920			AA: vw JW: vw, nl
4/30/2007	Joyce	Toppin	L396	5/1/2007	7	C	Ernest Wade	J540	8/13/2007	21	vw, nl
5/1/2007	[redacted]		7729				[redacted]	J883	8/21/2007	8	vw, dl
5/4/2007	Toni	Worden-Thompson	K867	10/31/2007	35		Dale Evans	F840	3/12/2007	18	Jim Barnes investigation
5/11/2007	Faith	Snadden	3789			C	Carl Bowling	1185	8/2/2006	28	vw
5/17/2007	Toni	Campbell	7508	7/3/2007	36	L	Joan Plane	888B	1/11/2006	14	vw, nl
5/23/2007	Diana	Chester	2548	7/26/2007	32		William Eldridge	8378	8/8/2007	41	vw, nl
5/27/2007	Janet	Ramsey	G784	5/2/2007	3		John Wilson	8443	5/9/2008	11	vw, nl
6/18/2007			106C	1/25/2008	4	L		051C	1/28/2008	11	vw, nl
7/11/2007	Brandy	Brown	419C	7/3/2007	4	L	Glenn Rogers	477K			vw, nl
7/20/2007	Stacy	Barajas	234B	8/8/2007	4	L	Jerry Williamson	0801			vw, nl
7/23/2007	Britney	Coyen	95SC	11/20/2007	7	L	James Bell	1587	9/28/2007	7	vw, nl
8/3/2007	Mary	Beaton	377D	8/2/2007	8	L	Gerry Brown	4180	9/20/2007	22	vw, nl
8/6/2007	Sherry	O'Donnell	K371	8/8/2007	21	L	William Compeau	O264			vw, dl
8/7/2007	Donna	Byington	009C	11/22/2007	18	C	Isaiah Fields	476C	8/13/2007	36	I
8/25/2007	Kimberly	Watson	009E	8/21/2008	2	L	Leslie Crocker	A174	11/29/2007	2	vw, nl
8/28/2007	Lisa	Bingaman	122E	11/7/2007	7	L	Dennis Sergis	G730	11/20/2007	11	vw, nl

SA3

REDACTED

POSITIVE WORK ENVIRONMENT COMMUNICATION

Incident	Last	First	Trip #	Incident Date	Days Since		Driver Name	ID	Hired Date	Days Hired	Comments
10/2/2007	Kathleen	Peterson	888B	10/1/2007	18	C	Ronald Wright	381C	10/1/2007	18	[violated alcohol policy]
10/2/2007	[redacted]		190C	1/25/2004	4	C	[redacted]	701A	11/23/2007	43	vw, nf, ad
10/4/2007	Deborah	Carey	E481	3/28/2008	28	C	Ray Green	862C	1/14/2008	39	vw, nf
10/10/2007	[redacted]		745E	12/7/2007	55	L	[redacted]	Z202	2/26/2006	8	vw, nf
10/15/2007	[redacted]		844E	10/15/2007	7		[redacted]	Y858			vw, df
10/15/2007	[redacted]		058F	2/1/2008	4						[dismissed from orientation]
10/25/2007	Barbara	Dixon	1308			C	Raymond Peterson	808E			vw, nf
10/31/2007	Michelle	Schudder	K233	11/4/2007	43		Jeff Francis	FM			df
11/5/2007	Pamela	Gaddis	134E	11/4/2007	4	C	Juan Vallelo	804A	11/27/2007	2	vw, df
11/5/2007	Pamela	Gaddis	134E	11/4/2007	4	C	Chris Armstrong	1364			vw, df
11/6/2007	Kathleen	Seymour	291F	11/15/2007	7	L	Randall Martin	367C	6/20/2008	4	vw, nf
11/12/2007	Michelle	Cassella	F216			L	Charles Jackson	D788	3/18/2008	28	vw, nf
11/16/2007	Donna	Pettus	852E	1/30/2008	2		Levy Deese	073J			vw, nf
11/19/2007	Julie	Vincent	252D	4/26/2004	3	C	Keith Gamberry	247B	2/13/2008	7	vw, nf
11/28/2007	Frances	Hedley	434F	11/23/2007	7		Larry Jefferson	F878	2/3/2008	2	df
12/17/2007	Carole	Pelt	685F	2/21/2008	30	L	Jimmy Rowell	168E	1/21/2008	7	vw, nf
1/2/2008	Nicole	Cinquemano	359G	4/16/2008	19		Randy Moore	F575			vw, df
1/21/2008	Rhonda	Wellman	026G				Dylan Brewster Buckley	E288	7/8/2008	4	vw, nf
1/30/2008	Paula	Sevilla	980G	3/24/2008	33		Ronald Pisarczyk	765B	3/30/2008	18	vw, nf
2/26/2008	[redacted]		550H	6/26/2008	4	L	[redacted]	1250	3/18/2008	4	vw
2/29/2008	[redacted]		336H	4/10/2004	11		[redacted]	744B	3/8/2008	4	vw, nf
3/7/2008	[redacted]		W668	11/8/2007	14			Office Employee			I
3/12/2008	Shannon	Alger-Aguirre	618G				John Kewley	8920	3/13/2008	28	t
3/12/2008	Tracey	Ball	843H	7/6/2008	34		Jafari Whitfield	830I			vw, nf
3/12/2008	Rebecca	Shields	348C	3/7/2008	22						df
3/14/2008	[redacted]		043H				[redacted]	J195	3/10/2008	4	df
4/4/2008	[redacted]		318H				[redacted]	191D	8/25/2008	21	df
4/15/2008	[redacted]		E095				[redacted]	833G			vw, df
4/25/2008	Kelly	Wheeler	395H				Michael Poland	102G	8/25/2008	4	vw, df
4/28/2008	Pamela	Barlow	813I	4/16/2008			David Martin	C490			vw, nf
4/30/2008	Katarina	Heckman	833E				Louis Mastalvelli	732I	5/7/2008	22	vw, nf
5/19/2008	Brenda	Kennett	311G				Larry Canyao	579J			vw, df
5/27/2008	Erin	Scott	071J	6/10/2008	7		David Martin	B243			vw, nf
6/10/2008	[redacted]		487J	6/6/2008	3		[redacted]	201A	6/16/2008	10	df
6/17/2008	[redacted]		186E				[redacted]	829D			df
7/7/2008	Diana	Vance	733J	6/6/2008	8		Jim Felix	777J	6/4/2008	4	vw, nf
7/9/2008	[redacted]		408K				[redacted]	429K			vw, df
7/18/2008	Elise	Soloman	676K				Julian Alpizar	139K			vw, nf
7/23/2008	Gwen	Allen	427K				David Moore	708B	8/8/2008	7	vw, df
8/12/2008	[redacted]		906J				[redacted]				np
8/16/2008	Bethany	Broeker	238K				Shahrzam Pourtahmi	443E	8/16/2008	14	vw, t
8/15/2008	[redacted]		336H	10/18/2008	4		[redacted]	504D	8/11/2008	7	vw
8/18/2008	Peggy	Blaze	885K				Brian Lombard	884G			vw, nf (except p1)
8/29/2008	Lois	Hills	337L				Robert Scolaro	4011	8/30/2008	40	t
10/3/2008	[redacted]		705J				[redacted]	733F			df
10/13/2008	[redacted]						[redacted]	Y083			vw, df

df: documented findings
nc: notified customer
nf: no female partners
sa: signed agreement
vw: verbal warning

nh: not hired
t: termination
vt: voluntary termination
ip: investigation pending

Lead Driver
Co-Driver

SA4

12/16/2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, BARBARA GRANT, CINDY MOFFETT, LATESHA THOMAS, and NICOLE ANN CINQUEMANO, Plaintiff-Interveners, v. CRST VAN EXPEDITED, INC., Defendant.	)	**Case No. 1:07-cv-00095-LRR**

AMENDED ALLEGEDLY AGGRIEVED PERSONS CHART

EEOC is the source of the information in all columns except "CRST's comments."

Key to EEOC Comments:

1. EEOC was aware of this woman's allegations at the time of the Determination (July 12, 2007). Had CRST not ended conciliation, EEOC would have sought relief for her.

2. EEOC was not aware of this woman's allegations of sex harassment at the time of the Determination (July 12, 2007). Had CRST not ended conciliation, EEOC would have negotiated with CRST a process for identifying, locating, and assessing the relief she would receive in connection with a conciliated resolution of the class-wide reasonable cause determination. As of the date of failure of conciliation (August 28, 2007), CRST had created an investigation file regarding her allegations.

3. EEOC was not aware of this woman's allegations of sex harassment at the time of the Determination (July 12, 2007). Had CRST not ended conciliation, EEOC would have negotiated with CRST a process for identifying, locating, and assessing the relief she would receive in connection with

a conciliated resolution of the class-wide reasonable cause determination.

4. This woman had not been harassed at the time of the Determination (July 12, 2007). Had CRST not ended conciliation, EEOC's conciliation efforts might have prevented her harassment.

5. This woman had not been harassed at the time of the Determination (July 12, 2007). Had CRST not ended conciliation, EEOC's conciliation efforts might have prevented her harassment. Investigation of her charge, filed after the date of the Determination, has been stayed by agreement of the parties pending the outcome of this lawsuit.

** In the "Dates complainant drove with alleged harasser" column, EEOC has provided the dates that the remaining allegedly aggrieved individuals drove with their alleged harasser(s) according to the "Trip Inquiry Reports" produced by CRST. The dates harassment is alleged to have occurred are within the ranges provided. Where an allegedly aggrieved individual alleges harassment by more than one person, the specific range the individual drove with each alleged harasser is provided. If the Court prefers that the parties attempt to provide more precise dates for when a woman claims the harassment took place within these periods for some or all the remaining allegedly aggrieved individuals, the parties will endeavor to provide the Court with additional information based on the undisputed summary judgment record and/or the discovery record.

Key to CRST's Comments:

1. EEOC admits that there was no independent investigation of this driver's claims prior to litigation, no independent reasonable cause determination at any time, and no offer of conciliation regarding her independent claims. CRST's comment 1 applies to all allegedly aggrieved drivers listed on the amended chart. EEOC's statements in its comments 1-5 about what it would have done or what would have occurred are speculative. EEOC's use of the term "class-wide" in its comments 2 and 3 is improper because EEOC failed to establish the existence of a "class."

2. CRST inquired after the litigation was filed about EEOC's position regarding pending

charges. EEOC advised CRST that "the pending charges should be left open" but that "no attention needs to be given to them by [EEOC] enforcement staff, and that the process can be suspended." (CRST's Mot. for Order to Show Cause, Doc. No. 222-5, Ex. 3 (Mar. 4, 2008 e-mail from B. Tyndall to R. Markowski).)

3. Before the litigation was filed, EEOC made a determination with respect to this driver's claim that "it is unable to conclude that the information obtained establishes a violation of the statutes."

4. EEOC has admitted that this driver did not meet the severe or pervasive standard applicable to individual claims in the absence of a pattern or practice of harassment.

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
1.	Alleva, Kierston	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 9/11/08.	8/20/07-9/18/07
2.	Ball, Tracy	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	3/8/08-3/12/08

SA8

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
3.	Barager, Stacy	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 2/27/08.	7/19/07
4.	Barlow, Pamela	None	N/A	7/12/07 (Date of Starke class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	4/20/08-4/25/08

SA9

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
5.	Bedford, Belinda	11/26/07	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	5 Individual charge dismissed 12/27/07	1, 2 EEOC dismissed individual charge on 12/27/07 After the litigation was filed, EEOC made a determination with respect to this driver's claim that "it is unable to conclude that the information obtained establishes a violation of the statutes." Disclosed by EEOC on 9/26/08.	7/22/07-8/1/07

SA10

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
6.	Bender, Mary	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 7/25/08.	7/11/07-7/27/07
7	Bingaman, Lillie	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	9/14/07-9/28/07 with Steele 9/10/07-9/14/07 & 10/13/07-10/20/07 with Dale

SA11

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
8.	Blake, Peggy	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	8/10/08-8/14/08
9.	Blauvelt, Amber	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex haras	3	1 Disclosed by EEOC on 9/26/08.	8/27/05-9/24/05 with Gum 9/24/05-10/1/05 with Barrows

SA12

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
10.	Brown-Lenzer, Adda	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 8/13/08.	10/23/06-11/7/06
11.	Carey, Deborah	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 9/11/08.	3/5/07-4/18/07 & 11/2/07-11/22/07 with Thompson 5/28/07-5/29/07 with Washington 8/21/07-9/5/07 with Whitfield 9/19/07-10/3/07 with Green

SA13

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
12.	Carney, Kelli	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	1/25/05-2/16/05
13.	Chester, Diana	9/26/07	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	5	1, 2 Disclosed by EEOC on 2/27/08.	5/13/07-5/20/07

SA14

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser
14.	Daniels, Margaret	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 9/11/08.	1/19/07-1/26/07 with Eldridge 3/5/07-3/12/07 with Jones
15.	Deese, Darleaner	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	3/29/07-4/4/07

SA15

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
16.	Dickson, Donna	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 7/11/08.	7/8/07-7/11/07
17.	Dixon, Barbara	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/7/08.	10/5/07-10/12/07 & 10/18/07-10/22/07

SA16

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
18.	Edwards, Nicole	10/05/07	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3 Individual charge still pending; investigation stayed per agreement	1, 2 Disclosed by EEOC on 2/27/08.	7/29/05-8/27/05, 9/6/05-9/28/05, 10/6/05-10/20/05
19	Fisk, Cynthia	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	11/8/07-11/17/07 with Booze 11/18/07 & 11/30/07-12/18/07 with Allen

SA17

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
20.	Fitch, Robryna	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	2/28/08-3/13/08 with Montiel 3/24/08-5/16/08 with Thompson 6/16/08-7/27/08 with McClure Fitch also alleges that Alvin Hoggard harassed her between 5/08-8/08 and that Thompson harassed her in 8/08

SA18

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
21.	Fortner, Yvonne	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	6/12/07-6/23/07
22.	Foster, Marie	12/01/06 (Charge did not include sex harass-ment allega-tions)	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3 Individual charge dismissed on 4/3/07	1, 3 EEOC dismissed individual charge on 4/3/07. Disclosed by EEOC on 4/18/08.	7/21/06-7/26/06 with Casteel 7/26/06-8/4/06 with Mahomes 10/28/06-11/13/06 with Holt

SA19

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
23.	Grant, Barbara	11/14/07	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3 Individual charge still pending; investigation stayed per agreement	1, 2 Disclosed by EEOC on 2/27/08.	6/17/07-6/27/07
24.	Grant, Zelestine	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 9/11/08.	11/2/07-11/9/07

SA20

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
25.	Griffin, Martha	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	6/11/05-6/17/05
26.	Halley, Sherri	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	8/26/07-8/27/07

SA21

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
27	Hasbell, Wanda	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 9/26/08.	5/7/05-5/16/05
28.	Heckman, Catherine	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	4/23/08-4/30/08

SA22

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser
29.	High, Victoria	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	5/5/07-5/7/05
30.	Hunsucker, Carolyn	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	6/7/07-6/13/07

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
31.	Hutton, Lola	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 4/18/08.	2/14/05-5/26/05
32.	Jackson, Sheila	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 9/26/08.	6/24/07-7/6/07

SA24

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
33.	Jackson, Tequila	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination: no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	8/4/05-8/8/05
34.	Johnson, Diona	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 9/26/08.	6/15/07-7/25/07 with Dorsey 8/7/07-8/26/07 with Johnson

SA25

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
35.	Lesmeister, Angela	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 7/25/08.	11/17/05-11/23/05 with Stansell 11/23/05-12/1/05 with Lopez
36.	Medley, Tessa (f/k/a Duncan)	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	2/9/06-2/12/06

SA26

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
37.	Merritt, Patricia	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	9/15/05-9/30/05
38.	Moffett, Cindy	11/1/07	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	5	1, 2 Disclosed by EEOC on 2/27/08.	4/23/07-5/13/07 & 5/20/07-6/7/07

SA27

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser
39.	Montoya, Valerie	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	4/19/05-4/25/05
40.	Moorer, Debra	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	1/19/08-2/1/08

SA28

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
41.	Mora, Veronica	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 3/2/09	8/6/08-8/23/08 with Blue 8/27/08-9/12/08 with McNair
42.	Noernberg, Julie	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	2/26/05-3/11/05

SA29

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
43.	O'dell, Bobbi	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	12/20/07-12/28/07
44.	Owens, Anya	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	6/29/07-8/11/07

SA30

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
45.	Peterson, Kathleen	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	8/19/07-10/1/07
46.	Petitt, Carole	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	12/4/07-12/15/07

SA31

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
47	Rice, Margaret	11/27/07	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	5	1, 2 Disclosed by EEOC on 2/27/08.	2/22/07-2/28/07
48.	Ross, Shalitha	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	10/1/05-10/3/05

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
49	Roundtree, Denise	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 8/13/08.	8/15/07-9/13/07
50.	Schuder, Mechelle (Leslie)	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	12/12/06-12/20/06 with Harrell 12/29/06-1/3/07 with Clark 4/10/07-4/16/07 with Hodson 4/24/07-5/15/07 with Saunders

SA33

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
51.	Scott, Jammie	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	4/27/05-5/1/05
52.	Shaw, Cathy	09/11/06	12/1/05-7/12/07 (Dates of Starke Investigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	1 Individual charge still pending; investigation stayed per agreement of parties	1, 2 Disclosed by EEOC on 2/27/08.	2/23/06-3/2/06

SA34

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated, allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
53.	Smith, Annette	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman s individual claim of sex harassment)	2	1 Disclosed by EEOC on 8/13/08.	3/8/07-3/21/07 with Clingerman 4/21/07-4/25/07 with Washington
54.	South, Gloria	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman s individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 7/25/08.	8/25/06-9/6/06

SA35

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser
55.	Thomas, Latesha	06/14/07 (ICRC charge)	12/1/05-7/12/07 (Dates of Starke Investigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman s individual claim of sex harassment)	1 Individual charge dismissed by ICRC on 8/22/07. reopened by ICRC on 11/30/07 transferred to EEOC on 2/4/08; investigation stayed per agreement of parties	1, 2 EEOC dismissed individual charge on 9/24/07 reopened on 11/30/07 at request Thomas private counsel. Disclosed by EEOC on 2/27/08.	11/26/06-12/14/06

SA36

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
56.	Tiberio, Doris	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 9/11/08.	5/11/07-6/7/07 with Heeney 8/31/07-9/26/07 with Kostner
57	Toppin, Joyce	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/7/08.	4/19/07-5/1/07

SA37

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
58.	Traylor, Tracye	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 10/15/08.	8/3/06-8/8/06
59.	Tuttle, Tracy	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 4/18/08.	4/24/06-5/17/06

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
60.	Villarreal, Ramona	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 7/25/08.	8/5/05-8/25/05 with Dejong 8/26/05-9/8/05 with Booth
61.	Waisr, Rebecca	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 9/26/08.	9/22/07-10/7/07

3A39

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
62.	Wallace, Barbara	None	12/1/05-7/12/07 (Dates of Starke Investigation) no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	4/6/05-4/16/05
63.	Warden Thompson, Tiani	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	2	1 Disclosed by EEOC on 2/27/08.	3/3/07-3/10/07

SA40

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
64.	Watson, Kimberly	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 9/26/08.	9/1/07-9/25/07 with Crockett 10/8/07-10/14/07 with Petty 3/15/08-3/20/08 with Lombard
65.	Wellman, Rhonda	None	N/A	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	4	1 Disclosed by EEOC on 10/15/08.	12/11/07-12/16/07 with Frelix 12/26/07-1/20/08 with Brewster Buckley 1/21/08-2/6/08 with Flowers

SA41

No.	Allegedly Aggrieved Person	Date of EEOC Charge	Date(s) EEOC investigated allegation(s) of sexual harassment	Date(s) of reasonable cause determination	Date(s) of conciliation or attempted conciliation	EEOC's comments	CRST's comments	Dates complainant drove with alleged harasser**
66.	Wilson, Tameisha	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 10/15/08.	2/2/07-3/10/07
67	Wright-Hoffman, Pamela	None	12/1/05-7/12/07 (Dates of Starke Investigation; no separate investigation of this woman's individual claim of sex harassment prior to litigation)	7/12/07 (Date of Starke/class Determination; no separate Reasonable Cause Determination)	7/12/07-8/28/07 (Dates of Starke/class conciliation efforts; no separate conciliation of this woman's individual claim of sex harassment)	3	1 Disclosed by EEOC on 9/26/08.	6/14/06-7/12/06

*** Please list allegedly aggrieved persons in alphabetical order by surname.

ROBERT E. KONCHAR
STEPHEN C. NELSON
J. SCOTT BOGGUSS
PHILIP D. BROOKS
KEVIN J. VISSER
RANDAL J. SCHOLER
WILLIAM S. VERNON
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WILLIAM A. BERGMAN, RETIRED

August 7, 2007

[illegible] email
twolle@moyerbergman.com

Ms. Pamela A. Bloomer
Equal Employment Opportunity Commission
310 West Wisconsin Avenue, Suite 800
Milwaukee, WI 53203

Re: Charge Number 260-2005-06856
Monika Starke vs. CRST International

Dear Ms. Bloomer:

I represent CRST International, Inc. in the above matter and write in response to your letter of July 12, 2007 (signed by John P. Rowe) in the above matter. I'm sorry it has taken me so long to respond; I've been in trial out of state for several weeks. My client is interested in conciliation. Please contact me to schedule the same. Thank you.

AUG 09 2007

Very truly yours,

MOYER & BERGMAN, P.L.C.

Thomas D. Wolle

TDW/dw

cc: James Barnes
Jeff Tronvold

EEOC 1000021

EEOC Form 5 (6/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: [ ] FEPA [X] EEOC

Agency(ies) Charge No(s): 2-05-5C8[illegible] 260-2005-06856C

Iowa Civil Rights Commission and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.): Mrs. Monika Starke

Date of Birth:

City, State and ZIP Code:

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name	No. Employees, Members	Phone No. (Include Area Code)
CRST, Inc.	500 or More	(800) 366-8408

Street Address: 3930 16th Avenue S.W., P.O. Box 68, Cedar Rapids, IA 52406

City, State and ZIP Code:

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address:

City, State and ZIP Code:

DISCRIMINATION BASED ON (Check appropriate box(es).)

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN [ ] RETALIATION [ ] AGE [ ] DISABILITY [ ] OTHER (Specify below.)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
07-07-2005	08-31-2005

[ ] CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I. I was hired by the Respondent on June 22, 2005 in the position of Truck Driver. Since my employment began with the Respondent I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. "You got big tits for your size, etc..." I informed Bob Smith that I was not interested in a sexual relationship with him. On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

II. The Respondent did not state why I was subjected to sexual harassment which created a hostile work environment.

III. I believe that the Respondent discriminated against me on the basis of my sex (female) in that I was subjected to sexual harassment, in violation of the Title VII of the Civil Rights Act of 1964, as amended.

DEC 01 2005

EEOC 1000181

05 DEC -5 AM 11:42

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY – When necessary for State and Local Agency Requirements

I declare under penalty of perjury that the above is true and correct.

x 11-28-05 x Monika Starke

Date — Charging Party Signature

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

Personal Data Identifiers redacted per LR 10(h)

EEOC FORM 131 (5/01) **U. S. Equal Employment Opportunity Commission**

Human Resources
CRST
3930 16th Avenue S.W.
P.O. Box 68
Cedar Rapids, IA 52406

PERSON FILING CHARGE

Monika Starke

THIS PERSON *(check one or both)*

☐ Claims To Be Aggrieved

☐ Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

260-2005-08856C

NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

☒ Title VII of the Civil Rights Act ☐ The Americans with Disabilities Act

☐ The Age Discrimination in Employment Act ☐ The Equal Pay Act

The boxes checked below apply to our handling of this charge:

1. ☐ No action is required by you at this time.
2. ☐ Please call the EEOC Representative listed below concerning the further handling of this charge.
3. ☒ Please provide by **30-DEC-05** a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
4. ☒ Please respond fully by **30-DEC-05** to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
5. ☐ EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by to

If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Marian L. Drew,
Intake Supervisor
EEOC Representative
Telephone (414) 297-4077

Milwaukee District Office
310 West Wisconsin Ave
Suite 800
Milwaukee, WI 53203

Enclosure(s): ☒ Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ AGE ☐ DISABILITY ☐ RETALIATION ☐ OTHER

See enclosed copy of charge of discrimination.

EEOC 1000182

Date	Name / Title of Authorized Official	Signature
Dec 01, 2005	John P. Rowe, District Director	

U.S. Equal Employment Opportunity Commission
Milwaukee District Office

310 West Wisconsin Ave
Suite 800
Milwaukee, WI 53203
(414) 297-1111
TTY (414) 297-1115
FAX (414) 297-4133
1-800-669-4000

Charging Party: Monika Starke
EEOC Charge No.: 260-2005-06856

CRST
3930 16th Avenue S.W.
P.O. Box 68
Cedar Rapids, IA 52406

To Whom It May Concern:

Your organization is hereby requested to submit information and records relevant to the subject charge of discrimination. The Commission is required by law to investigate charges filed with it, and the enclosed request for information does not necessarily represent the entire body of evidence which we need to obtain from your organization in order that a proper determination as to merits of the charge can be made. Please submit a response to the requested information by the deadline cited below.

The information will only be disclosed in accordance with 29 C.F.R. 1601.22, or otherwise made public if the charge results in litigation.

Sincerely,

LaVonne Williams

LaVonne A. Williams
Investigator

Response Deadline Date: 12/30/05

The following dates are considered to be the "relevant period" for the attached Request for Information:
January 2, 2005 - November 2, 2005

EEOC 1000526

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REQUEST FOR INFORMATION

Charging Party: Monika Starke
Respondent: CRST
EEOC Charge No.. 260-2005-06856

1. Give the correct name and address of the facility named in the charge.

2. State the total number of persons who were employed by your organization during the relevant period. Include both full and part-time employees. How many employees are employed by your organization at the present time?

3. Supply an organizational chart, statement, or documents which describe your structure, indicating, if any, the relationship between it and superior and subordinate establishments within the organization.

4. Supply a statement or documents which identify the principal product or service of the named facility.

5. State the legal status of your organization, i.e., corporation, partnership, tax-exempt non-profit, etc. If incorporated, identify the state of incorporation.

6. State whether your organization has a contract with any agency of the federal government or is a subcontractor on a project which receives federal funding. Is your organization covered by the provisions of Executive Order 11246? If your answer is yes, has your organization been the subject of a compliance review by the OFCCP at any time during the past two years?

7 Submit a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge.

8. Submit copies of all written rules, policies and procedures relating to the issue(s) raised in the charge. If such does not exist in written form, explain the rules, policies and procedures.

EEOC 1000548

Issue: HARASSMENT

1. State whether your organization has adopted any procedure by which an employee may register a complaint of harassment by co-workers or supervisors. If your answer is yes, describe and, if written, submit a copy of such procedures. Explain how these procedures are communicated to employees and supervisory personnel.

2. State whether the charging party complained to any supervisor or manager regarding the conduct described in the Charge of Discrimination. If your answer is yes, identify the person or persons with whom the complaint was registered and describe each and every action taken by your organization in response to that complaint. Provide a copy of any written document which reflects the complaint and the action taken as a result of the complaint.

3. State whether any other individual has complained to any supervisor or manager concerning the conduct described in the Charge of Discrimination. If the answer is yes, please list the following:

a. name, sex, position, of individual placing the complaint,
b. name, sex, position, of supervisor or manager, and
c. any actions taken by your organization in response to the complaint.

Provide a copy of any written document which reflects the complaint and the action taken as a result of the complaint.

4. Identify every individual who, to your knowledge, has information relevant to the allegations. For each such individual, provide the following:

a. name, sex, position,
b. whether a present or former employee (if applicable), and
c. address and telephone number.

5. Identify the other employees who worked with the charging party during the relevant period. Include:

a. name, sex, position,
b. last known address and telephone.

Submit copies of daily assignment sheets, time cards, attendance and payroll records for the individuals listed in #5, including the charging party.

EEOC 1000549

Request for Information

Charging Party: Monika Starke
Respondent: CRST International
EEOC Charge No.: 260-2005-06856

1. CRST International, Inc.
   P.O. Box 68
   Cedar Rapids, IA 52406

2. 3286 employees were employed during the relevant period and presently.

3. ***Attachment A***

4. CRST is a transportation company, which focuses on moving long-haul freight.

5. CRST is a corporation, which is incorporated in the state of Iowa.

6. No

7. See enclosed Position Statement

8. ***Attachment B***

EEOC 1000529

Request for Information

Charging Party: Monika Starke
Respondent: CRST International
EEOC Charge No.: 260-2005-06856

Issue: Harassment

1. Yes, CRST has an internal "investigation/resolution" process. Employees have been made aware of this process through the employee handbook. The handbook is distributed at the one-week orientation each driver must attend before being hired. This policy is addressed during the specified time. *Attachment A*

2. See Position Statement

3. Lori Essig
Date Reported: July 7, 2005
Accused Wayne Scates of sexual harassment
Wayne Scates is no longer eligible to train female students at CRST

Tamara Thiel
Date Reported: August 23, 2005
Accused Spencer Cuiffo of sexual harassment
Spencer Cuiffo resigned his employment before complaint was filed

4. James T. Barnes
Male
Director of Human Resources
Present Employee
P.O. Box 68
Cedar Rapids, IA 52406
(319)390-2770

Lisa M. Laveck
Female
Human Resources Generalist
Present Employee
P.O. Box 68
Cedar Rapids, IA 52406
(319)390-2773

Frank Taylor
Male
Over the Road Driver
Former Employee
P.O. Box 822181
Richland Hills, TX 76182
859-255-2461

Raychelle Puchta
Female
Fleet Manager
Present Employee
P.O. Box 68
Cedar Rapids, IA 52406
(800)366-4024

EEOC 1000530

EEOC FORM 131 (5/01) **U. S. Equal Employment Opportunity Commission**

Human Resources
CRST
3930 16th Avenue S.W.
P.O. Box 68
Cedar Rapids, IA 52406

PERSON FILING CHARGE: **Monika Starke**

THIS PERSON *(check one or both)*
- [ ] Claims To Be Aggrieved
- [ ] Is Filing on Behalf of Other(s)

EEOC CHARGE NO.: **280-2005-06858C**

NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

- [X] Title VII of the Civil Rights Act
- [ ] The Americans with Disabilities Act
- [ ] The Age Discrimination in Employment Act
- [ ] The Equal Pay Act

The boxes checked below apply to our handling of this charge:

1. [ ] No action is required by you at this time.
2. [ ] Please call the EEOC Representative listed below concerning the further handling of this charge.
3. [X] Please provide by **30-DEC-05** a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
4. [X] Please respond fully by **30-DEC-05** to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
5. [ ] EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by to If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Marian L. Drew,
Intake Supervisor
EEOC Representative
Telephone: **(414) 297-4077**

Milwaukee District Office
310 West Wisconsin Ave
Suite 800
Milwaukee, WI 53203

Enclosure(s): [X] Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN [ ] AGE [ ] DISABILITY [ ] RETALIATION [ ] OTHER

See enclosed copy of charge of discrimination.

EEOC 1000182

Date	Name / Title of Authorized Official	Signature
Dec 01, 2005	John P. Rowe, District Director	

U.S. Equal Employment Opportunity Commission
Milwaukee District Office

310 West Wisconsin Ave
Suite 800
Milwaukee, WI 53203
(414) 297-1111
TTY (414) 297-1115
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EEOC Charge No.. 260-2005-06856

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EEOC 1000549

Request for Information

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Respondent: CRST International
EEOC Charge No.: 260-2005-06856

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   P.O. Box 68
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EEOC 1000529

Request for Information

Charging Party: Monika Starke
Respondent: CRST International
EEOC Charge No.: 260-2005-06856

Issue: Harassment

1. Yes, CRST has an internal "investigation/resolution" process. Employees have been made aware of this process through the employee handbook. The handbook is distributed at the one-week orientation each driver must attend before being hired. This policy is addressed during the specified time. *Attachment A*

2. See Position Statement

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Date Reported: July 7, 2005
Accused Wayne Scates of sexual harassment
Wayne Scates is no longer eligible to train female students at CRST

Tamara Thiel
Date Reported: August 23, 2005
Accused Spencer Cuiffo of sexual harassment
Spencer Cuiffo resigned his employment before complaint was filed

4. James T. Barnes
Male
Director of Human Resources
Present Employee
P.O. Box 68
Cedar Rapids, IA 52406
(319)390-2770

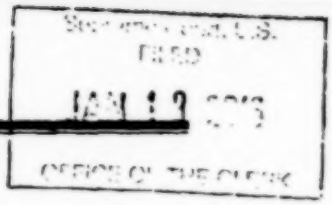
Lisa M. Laveck
Female
Human Resources Generalist
Present Employee
P.O. Box 68
Cedar Rapids, IA 52406
(319)390-2773

Frank Taylor
Male
Over the Road Driver
Former Employee
P.O. Box 822181
Richland Hills, TX 76182
859-255-2461

Raychelle Puchta
Female
Fleet Manager
Present Employee
P.O. Box 68
Cedar Rapids, IA 52406
(800)366-4024

EEOC 1000530

No. 14-1375



IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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JENNER & BLOCK LLP
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Chicago, IL 60654
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*Not admitted in DC; supervised by principals of the Firm.

January 19, 2016

PARTIES TO THIS PROCEEDING

The only two parties to this proceeding are identified in the case caption on the cover.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner CRST Van Expedited, Inc. is the wholly owned subsidiary of its parent corporation, CRST International, Inc., which is a privately held corporation. No publicly held corporation owns any of CRST Van Expedited's or CRST International's stock.

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OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a) is reported at 774 F.3d 1169 (8th Cir. 2014). The opinion of the United States District Court for the Northern District of Iowa (Pet. App. 33a) is unreported but is available at 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013). The Eighth Circuit's earlier opinion (Pet. App. 86a) is reported at 679 F.3d 657 (8th Cir. 2012). The district court's earlier opinion (Pet. App. 164a) is unreported but is available at 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa Aug. 13, 2009).

JURISDICTION

The Eighth Circuit entered its judgment on December 22, 2014, and denied petitioner's timely petition for rehearing en banc on February 20, 2015. Petitioner filed a timely petition for certiorari on May 19, 2015, which this Court granted on December 4, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

Section 706 of Title VII, 42 U.S.C. § 2000e-5, provides in pertinent part that:

> (b) . . . Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.
>
> * * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT

In the underlying litigation before the district court, the Equal Employment Opportunity Commission (EEOC) admitted that it had asserted 67 individual claims of sexual harassment against CRST under Title VII without first investigating the claims, determining whether there was reasonable cause to believe them, or attempting to conciliate them, as Title VII requires. The district court therefore dismissed those claims, and the Eighth Circuit affirmed. Based on those rulings, which are no longer at issue, Petitioner sought, and the district court awarded, attorney's fees and costs pursuant to Title VII and this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Eighth Circuit, however, reversed the fee award based on that circuit's rule that fee awards to defendants require a resolution of the case "on the merits." As shown *infra*, there is no such limitation in the statute or in this Court's precedents. Nor would it make sense to create one. And even if there were a requirement that defendants prevail "on the merits" in order to qualify for fees, such a rule would not bar the award in this case.

A. Statutory Background

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. Title VII also created the EEOC. *Id.* § 2000e-4(a).

Title VII's enforcement procedure begins when a "person claiming to be aggrieved" by an "unlawful employment practice" files a charge with the EEOC.

Id. § 2000e-5(b). The statute provides that the EEOC "shall serve a notice of the charge" on the employer (including "the date, place and circumstances of the alleged unlawful employment practice") and that the EEOC "shall make an investigation." *Id.* If the EEOC "determines after such investigation that there is not reasonable cause to believe that the charge is true," it dismisses the charge and notifies the parties. *Id.* The individual claiming to be aggrieved may then sue the employer in district court. *Id.* § 2000e-5(f)(1). If, however, the EEOC determines "that there is reasonable cause to believe that the charge is true," it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b).

Under the 1964 Act, the EEOC had no authority to bring suit if conciliation was unsuccessful. Rather, "[t]he failure of conciliation efforts terminated the involvement of the EEOC." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358-59 (1977). When conciliation failed, the EEOC notified the individual claiming to be aggrieved, and he or she could then bring a civil action in district court. *Id.*; *see* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260. The 1964 Act did, however, empower the Attorney General to bring a civil action on behalf of the United States if he or she had "reasonable cause to believe" that an employer was intentionally "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title." *Id.* § 707(a), 78 Stat. at 261 (codified at 42 U.S.C. § 2000e-6(a)); *see*,

e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 328-30 (1977).

In 1972, Congress modified the statute in two significant respects. First, it authorized the EEOC to bring a civil action against the employer named in a charge if, after completing the above procedures, the EEOC was "unable to secure from the respondent a conciliation agreement acceptable to" it. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (codified at 42 U.S.C. § 2000e-5(f)(1)). The amended Act thus established "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life*, 432 U.S. at 359. The EEOC must first investigate the charge; next determine if there is reasonable cause to believe that it is true; and then attempt to conciliate any credible claims it identifies. *See id.* Only if the EEOC completes these procedures and its conciliation efforts are unsuccessful can it file suit based on those identified claims. *See id.*[1]

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[1] As this Court has noted, the courts of appeals have held that the EEOC may litigate claims that it identifies in a reasonable investigation of the original charge, even if those claims were not raised in the charge itself. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 331 (1980). This "reasonable investigation" rule still requires that all claims be subject to an investigation, a reasonable-cause determination, and a conciliation effort by the EEOC before it brings suit. *See, e.g.*, *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976), *cited in Gen. Tel. Co. of the Nw., Inc.*, 446 U.S. at 331.

Second, while preserving the separate statutory provision for "pattern or practice" actions, Congress transferred that enforcement authority from the Attorney General to the EEOC. Pub. L. No. 92-261, § 5, 86 Stat. at 107 (codified at 42 U.S.C. § 2000e-6(c), (e)); *see Int'l Bhd. of Teamsters*, 431 U.S. at 328 n.1. When it brings a pattern-or-practice suit pursuant to the separate statutory authorization in Section 707, the EEOC "is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Int'l Bhd. of Teamsters*, 431 U.S. at 360. Rather, the EEOC's "burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant." *Id.*

The statute has always provided, as it does now, that in any Title VII action, "the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k). In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), this Court held that a district court may award an attorney's fee to a prevailing defendant under this provision only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation."

B. Proceedings Below

1. Background

CRST is a family-owned long-distance trucking company headquartered in Cedar Rapids, Iowa. JA 397a. CRST employs two-driver teams to transport shipments throughout the nation on large tractor-trailer trucks. *Id.*

Working conditions for CRST's long-haul drivers are unlike those for many jobs. The two-driver teams spend up to twenty-two hours a day together operating a large truck. The truck's cab, with two front seats and a two-bunk berth area, has both driving and living functions. Trips may last up to twenty-one days, and drivers usually spend no time with their families during such trips. Access to restrooms and showers is limited. Because drivers are continuously on the road, their supervisors seldom see them working together. *Id.* at 397a-398a.

CRST employs three categories of team drivers: (i) trainees; (ii) lead drivers who provide the training; and (iii) fully qualified co-drivers. All three categories of drivers report to dispatchers. *Id.* at 398a.

The EEOC interprets Title VII to require that trucking companies compose their driver teams without regard to sex. In 1997 and 2004, the EEOC sued two trucking firms for implementing same-sex assignment policies, seeking punitive damages. Both cases were settled with consent decrees that "prohibit[] the Company from preferring same-sex assignments of drivers during training." Consent Decree 5, *EEOC v. Gordon Trucking, Inc.*, Case No. 3:04-cv-5646 (W.D.

Wash. Oct. 4, 2004) (reprinted in ECF No. 150-5 at 124, 128); Consent Decree 5, *EEOC v. Swift Transportation Co., Inc.*, Case No. 3:97-cv-965 (D. Or. Oct. 28, 1998) (reprinted in ECF No. 150-5 at 85, 89). The EEOC recently prevailed in another challenge to a trucking company's same-sex driver team policy. *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014). In that case, the court agreed with the EEOC that such policies are "facially discriminatory" and cannot be justified by a concern to protect drivers from sexual harassment. *Id.* at 1213-14.

Based on the EEOC's requirements, CRST has adopted a gender-neutral policy in composing its driver teams. Consequently, women and men often drive together. JA 401a. At the time of the events at issue, 14% of CRST's drivers were women, which was "more than three times as many women as an expert would predict" based on "the availability of women in the relevant labor market." *Id.* at 400a-401a.

2. EEOC Investigation and Preliminary Proceedings

On December 1, 2005, Monika Starke, a CRST driver, filed a Charge of Discrimination with the EEOC, alleging two different incidents of sexual harassment by two different male lead drivers. Pet. App. 165a-166a. The EEOC undertook an investigation of Ms. Starke's allegations, and CRST voluntarily provided a variety of requested information. *Id.* at 167a-173a & n.6. Over the next several months, the EEOC made additional requests for information about, *inter alia*, other women who had driven with the alleged harassers; other charges of harassment that

CRST had received from any government agency within the past five years; and the driving histories of all female drivers employed since 2005. *Id.* at 171a-180a. CRST voluntarily provided all of this information as well. *Id.* at 179a-180a.

On July 12, 2007, the EEOC issued a Letter of Determination finding "reasonable cause to believe" that CRST "subjected [Starke] to sexual harassment," and also that CRST "has subjected a class of employees and prospective employees to sexual harassment." JA 811a. The parties tried and failed to conciliate Ms. Starke's claim. Pet. App. 183a. No other individual claims were raised or discussed during the conciliation process.[2] When CRST inquired as to the purported "class" identified in the EEOC's Letter of Determination, the EEOC responded that it "was not able to provide names of all class members" or even "an indication of the size of the class." *Id.* at 182a (quoting JA 282a (Decl. of EEOC Investigator Bloomer)).

3. District Court Litigation and Discovery Proceedings

On September 27, 2007, the EEOC filed a single-count complaint under Section 706(f) of Title VII on behalf of Ms. Starke and a class of "similarly situated" but unidentified female employees of CRST. JA 783a-809a. The EEOC sought injunctive relief and compensatory and punitive damages for Ms. Starke and

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[2] The EEOC subsequently made a reasonable-cause determination with respect to one other individual charge of sexual harassment filed by another CRST driver, Remcey Peeples. The EEOC attempted to conciliate that claim in October 2007. JA 283a.

other women who had allegedly been sexually harassed while they were employed by CRST. The complaint did not make any allegations that CRST had engaged in a "pattern or practice" of discrimination, and it did not invoke Section 707 of Title VII. *See id.* at 792a-799a.

As the district court explained, neither the EEOC's Letter of Determination nor its complaint identified any individual claimants other than Ms. Starke or provided any "indication of how many 'similarly situated female employees' the EEOC alleged to exist." Pet. App. 186a-187a. The court adopted a discovery plan based on its impression that "the number of allegedly aggrieved persons was relatively small." *Id.* at 187a. In the course of discovery, however, "it became clear that the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief," and that "the EEOC was using discovery to find them." *Id.* at 188a. For example, between May and September of 2008, the EEOC sent 2,730 letters to former female employees of CRST soliciting them to participate in the lawsuit. *Id.*

Fearing that "this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons," the court set a deadline of October 15, 2008, for the EEOC to identify all of the individuals whose claims it would pursue in this case. *Id.* at 188a-189a. Roughly one week before the deadline, the EEOC had identified 79 claims. *Id.* at 189a. In the final days, however, the EEOC began identifying large numbers of claims very quickly. *Id.* at 190a. The EEOC ultimately named 270

individuals who had allegedly been sexually harassed by male CRST drivers. *Id.* at 189a.

Because the EEOC identified so many claims in such a short period of time, CRST moved for an order to show cause why the hastily identified claims should not be dismissed on the ground that the EEOC could not possibly have investigated them or adequately determined their validity. In response, the EEOC asserted that "[e]ach class member named by the EEOC ... has provided credible evidence of sexual harassment." JA 689a.[3] The EEOC also asserted that it intended to litigate this matter as "a pattern or practice case." *Id.*

The district court accepted the EEOC's "represent[ation] to the court that ... it had a good-faith belief that each and every one of the approximately 270 women disclosed to CRST has an actionable claim for sex discrimination." *Id.* at 655a. But the court warned the EEOC that if it later turned out that its claims were not reasonably grounded, CRST could file "an appropriate motion." *Id.* at 656a. The district court also advised CRST that, "[c]onsistent with the EEOC's representations to the court, CRST may assume with some certainty that this is approximately a 270-person pattern-or-practice case." *Id.* at 657a.

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[3] The EEOC noted one exception: it had named 56 women with whom it had not yet had "personal contact," but as to whom it nonetheless "ha[d] a good faith belief that they were likely victims of sexual harassment." JA 696a.

The number of claimants was reduced, however, when the district court dismissed 99 of the EEOC's original 270 individual claims as a discovery sanction—which the EEOC did not appeal—because the claimants did not appear for their depositions. Pet. App. 192a. The EEOC unilaterally dropped 18 other claims. That left 154 claimants, each of whom CRST deposed.

After discovery closed, CRST moved for summary judgment with respect to the EEOC's contention that CRST had engaged in a "pattern or practice" of discrimination, as well as with respect to a majority of the EEOC's individual claims. JA 30a-34a.

In ruling on CRST's pattern-or-practice motion, the court emphasized that "[t]he EEOC did not plead a violation of § 707, and the phrase 'pattern or practice'—a phrase with which the EEOC is familiar—appears nowhere in the EEOC's Complaint." *Id.* at 382a. "[M]uch confusion ha[d] ... crept into this case," however, through the EEOC's repeated use of "pattern or practice" terminology in its briefing, which raised the concern that it was "pursuing matters in this case that it did not plead or allege in [its] Complaint." *Id.* The district court noted that it appeared "the EEOC is attempting to have its cake and eat it too," by "attempting to avail itself of the *Teamsters* burden-shifting framework yet still seek compensatory and punitive damages under § 706." *Id.* at 383a.

The court explained that it would bypass the "cloud of confusion" by simply assuming that the EEOC was entitled to argue a "pattern or practice" theory of liability. *Id.* The court then rejected that theory on the merits. In particular, the court found that CRST's

written anti-harassment policy and its enforcement of that policy satisfied Title VII's requirements, *id.* at 429a-431a, and that the incidence of allegations of sexual harassment at CRST was too low to suggest any wrongful pattern or practice, *id.* at 431a-433a. The court therefore concluded that the EEOC had not established even a *prima facie* case of a pattern or practice of tolerating sexual harassment. *Id.* at 429a; *see id.* at 433a (explaining that "the EEOC's argument boils down to little more than its bald assertions"). The court therefore held that "[t]o the extent that the EEOC asserts a 'pattern or practice claim' in this litigation against CRST, such claim is dismissed with prejudice." *Id.* at 442a.

The district court also granted summary judgment to CRST with respect to 87 of the EEOC's remaining 154 individual claims. Because CRST does not operate a large common workplace, such as a factory or office, each of the claims was based on unique facts, including different female drivers, alleged harassers, trucks, locations, times, and types of alleged harassment. The grounds for the court's summary judgment rulings varied from claim to claim and included that the alleged harassment was not severe or pervasive; that the female drivers had not complained of harassment when CRST could have acted to remedy it; that CRST had adequately responded when it did receive timely complaints; and that some claims were time-barred.[4]

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[4] The district court's summary judgment rulings on the EEOC's individual claims are included in the Joint Appendix. *See* JA 312a-346a (statute of limitations); JA 292a-311a (judicial estoppel); JA 223a-274a (interveners' claims); JA 205a-222a (failure to report or

4. Dismissal For Failure To Satisfy Pre-Suit Obligations

After the summary judgment rulings, 67 individual claims remained. Although the EEOC's class-wide "pattern or practice" theory had been rejected, the EEOC persisted in pressing these claimants' allegations, seeking to "present separate claims for each" at trial based on their particular facts. JA 348a (EEOC's Resistance to Mots. In Limine). CRST moved to dismiss these claims on the ground that the EEOC had not fulfilled its statutory obligations to investigate the facts, determine whether there was reasonable cause to believe that the complainants' allegations were true, and then, if so, attempt to conciliate their claims before bringing suit on their behalf.

In response to CRST's motion, the district court required the EEOC to specify whether and when it had investigated, found reasonable cause, and attempted to conciliate each of the claims. *Id.* at 278a-279a. In its submission, the EEOC conceded that, with respect to the "individual claim[s] of sex harassment" brought by each of the remaining 67 women, it had made "no separate investigation ... prior to litigation," reached "no separate Reasonable Cause Determination," and attempted "no separate conciliation."[5] Supp. App. 5-42.

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effective CRST response to reported harassment); JA 186a-204a (alleged harassment not severe or pervasive); JA 175a-185a (two or more grounds).

[5] The EEOC also conceded that it did not investigate, find reasonable cause, or attempt to conciliate any of the other claims resolved on summary judgment, with the exception of its two claims on behalf of Ms. Starke and Ms. Peeples. *See* JA 101a

However, the EEOC argued that, because it investigated Ms. Starke's charge of sexual harassment against CRST and included an undefined "class of employees" in its Letter of Determination for Ms. Starke's charge (as well as in another Letter for one other individual charge), the EEOC was not required to satisfy the pre-suit requirements for the hundreds of other individual claims that it added in the course of litigation.[6]

The district court rejected the EEOC's argument. As the court explained, the EEOC may pursue related claims that emerge in its pre-suit investigation, even if they are not raised in the original charge, as long as these claims are "included in the reasonable cause determination and subject to a conciliation proceeding." Pet. App. 199a (quoting *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992)). But, the court held, the EEOC may not avoid those requirements by including a "vague reference to a 'class' in the Letter of Determination" and then projecting back into that "class" hundreds of individual Section 706 claimants whom it discovers later. *Id.* at 211a-212a; *see id.* at 206a n.21. In effect, the court concluded, the EEOC was seeking to "bootstrap the investigation, determination

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(EEOC Reply Br. in No. 13-3159 (8th Cir.)). CRST has not sought to recover its fees with respect to the EEOC's claims on behalf of Ms. Peeples or Ms. Starke.

[6] The EEOC did not argue that it investigated a pattern-or-practice claim against CRST, and the administrative record does not reveal any investigation of such a claim. *See* ECF No. 244-2. As noted below, the EEOC has disavowed any pattern-or-practice claim in this case. *See infra* at 20.

and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons." *Id.* at 206a.

Based on the record, including the EEOC's administrative record of its investigation of Ms. Starke's charge, the district court found that the "EEOC did not conduct any investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." *Id.* at 204a. Rather, "[t]he record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case." *Id.* The court noted, for example, that the EEOC did not "interview any witnesses or subpoena any documents to determine whether any of the[] allegations were true." *Id.* at 205a. None of the alleged harassers was ever interviewed.

Accordingly, the court barred the EEOC from pursuing its remaining 67 claims, dismissed the EEOC's complaint, and entered judgment for CRST. *Id.* at 215a-216a.[7] The district court also awarded CRST $4,004,371 in attorney's fees and $463,071 in expenses, in addition to taxable costs. JA 174a. The court

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[7] Although the EEOC's claims were dismissed, Title VII provided all 67 individuals the right to pursue their own claims in their own names. *See* 42 U.S.C. § 2000e-5(f)(1). Three of the 67 individuals filed sexual harassment charges against CRST and intervened in the EEOC's action to assert their own claims through their own counsel. Those three claims survived the dismissal of the EEOC's claims on their behalf. *See* Pet. App. 194a n.18.

determined that such an award of attorney's fees was appropriate under *Christiansburg* "because the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court." *Id.* at 143a. The court further found that "[a]n award of fees is necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court." *Id.* Although the court "ma[de] no finding as to whether the trial attorneys for the EEOC acted in bad faith," it noted that "higher-level attorneys" at the EEOC had made sensational public statements accusing CRST of "rampant sexual harassment" even though the EEOC had not investigated its own claims. *Id.* at 143a n.4; *see* Pet. App. 214a n.25 (same).

5. First Appeal And Remand

The EEOC did not appeal the district court's pattern-or-practice ruling, including the court's finding that the EEOC did not establish even a *prima facie* case that CRST engaged in a pattern or practice of tolerating sexual harassment. The EEOC likewise did not appeal the dismissal of 99 of its claims as a discovery sanction for failing to make those claimants available for deposition. And the EEOC did not appeal the court's grants of summary judgment with respect to 47 of its other individual claims.

The EEOC did, however, appeal 40 of the 87 individual grants of summary judgment, as well as the award of fees and costs. The Eighth Circuit affirmed 38 of the 40 grants of summary judgment, but reversed as

to the other two, which concerned the individual claims that the EEOC brought on behalf of Monika Starke and Tillie Jones. Pet. App. 155a-156a. Because those two claims were remanded to the district court, there was no final judgment in place, and the Eighth Circuit accordingly vacated the district court's award of fees and costs without prejudice. *Id.* at 156a.

The EEOC also appealed the dismissal of the 67 claims for failure to satisfy Title VII's pre-suit requirements. The Eighth Circuit affirmed the dismissal, agreeing both that the EEOC had "wholly failed" to satisfy Title VII's pre-suit requirements and that dismissal was a permissible remedy under the circumstances. *Id.* at 115a-116a. The EEOC did not seek review from this Court of the Eighth Circuit's holding on either point.

On remand, the EEOC withdrew its claim on behalf of Ms. Jones because, under the law of the case, its failure to investigate, find reasonable cause, and attempt to conciliate her claim barred further litigation. The parties then settled the EEOC's claim on behalf of Ms. Starke and jointly moved to dismiss the case. The court entered a new final judgment dismissing the case with prejudice. JA 115a-119a.

CRST then renewed its petition for an award of attorney's fees and costs. Drawing on nearly six years of experience with the case and the parties, and evaluating that experience in light of this Court's guidance in *Christiansburg*, the district court again found that the EEOC's pursuit of its claims was unreasonable. Pet. App. 64a. The court awarded CRST $4,189,296 in attorney's fees, $413,387 in out-of-pocket

expenses, and $91,758 in taxable costs. Pet. App. 84a-85a.

6. Decision Under Review

The EEOC appealed the fee award to the Eighth Circuit. The EEOC contended that, because it had obtained a settlement regarding Ms. Starke, it was the prevailing party. The EEOC argued alternatively that, even if the EEOC had not prevailed, CRST was not entitled to a fee award because CRST was not a prevailing party either and the *Christiansburg* test was not satisfied. The EEOC also contended that the district court should not have awarded fees to CRST for successfully litigating the "pattern-or-practice issue," in part because "EEOC's one-count complaint does not include a 'pattern-or-practice claim.'" JA 113a & n.18. The EEOC expressly disavowed that it had brought any pattern-or-practice claim and explained that it had merely sought to "use a pattern-or-practice method of proof" to support its *individual* claims on behalf of the various claimants under Section 706. *Id.* at 114a.

The Eighth Circuit rejected the EEOC's contention that it was the prevailing party. Pet. App. 17a-18a. The court vacated the district court's fee award with respect to 84 of the individual claims resolved on summary judgment, however, because the district court "did not make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim." *Id.* at 28a. The Eighth Circuit remanded these claims to the district court to make such individualized determinations. It also held that, "to the extent that the district court's order awarded

attorneys' fees to CRST based on a purported pattern-or-practice claim," the court had erred because "the EEOC did not allege that CRST was engaged in 'a pattern or practice' of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII." *Id.* at 17a-18a (quotation marks omitted).

Finally, in the ruling under review here, the Eighth Circuit reversed the fee award with respect to the 67 claims dismissed because of the EEOC's failure to satisfy Title VII's pre-suit requirements. The EEOC had argued that the district court's dismissal of these claims did not "constitute a ruling on the merits," and that consequently CRST "cannot be a prevailing party with respect to those claims." *Id.* at 18a. The Eighth Circuit agreed, holding that the dismissal of those claims "does not constitute a ruling on the merits," and that "[t]herefore, CRST is not a prevailing party as to these claims." *Id.* at 23a-24a. The court also held that CRST could not satisfy the *Christiansburg* standard for the same reason: "'[P]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits.'" *Id.* at 18a (quoting *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994)).

CRST petitioned for rehearing en banc, which was denied on February 20, 2015. *Id.* at 218a. On December 4, 2015, this Court granted CRST's petition for certiorari.

SUMMARY OF ARGUMENT

Section 706(k) authorizes district courts to award attorney's fees to the "prevailing party" in a Title VII case and "entrust[s] the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg*, 434 U.S. at 416; *see* 42 U.S.C. § 2000e-5(k). That discretion is limited by this Court's decision in *Christiansburg*, which permits a fee award to a prevailing defendant only if the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation." 434 U.S. at 421.

The district court concluded that the *Christiansburg* standard was satisfied in this case because the EEOC "wholly abandoned" its statutory obligation to investigate the allegations at issue here, determine whether they were supported by "reasonable cause," and attempt conciliation before bringing suit. Pet. App. 204a. As the district court recognized, that failure rendered the EEOC's claims unreasonable because the EEOC had not followed the pre-suit administrative procedure required by Title VII and had instead placed "an unnecessary burden upon CRST and the court." JA 143a. The district court also concluded that a fee award to CRST was "necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court." *Id.*

The Eighth Circuit agreed that the EEOC "wholly failed to satisfy its statutory pre-suit obligations" in this case. Pet. App. 115a-116a. But the court reversed the award of fees on the ground that fee awards are

available only when a defendant prevails "on the merits," and CRST had not prevailed "on the merits" here. That holding is doubly erroneous. Fee awards to prevailing defendants are not limited to cases that are decided "on the merits," and in any event, a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements is properly viewed as a ruling "on the merits" of the EEOC's case.

1. The Eighth Circuit's rule that a prevailing defendant may recover fees only when a case is decided "on the merits" has no basis in the statute, conflicts with this Court's decision in *Christiansburg*, and severely undermines the policy of Section 706(k). As an initial matter, there can be no doubt that a defendant who secures a dismissal with prejudice, as CRST did here, is a "prevailing party." As this Court has explained, the prototypical "prevailing party" is a "party in whose favor a judgment is rendered." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (quotation marks omitted). While a plaintiff must obtain "relief on the merits of his claim" to prevail, *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), such a requirement cannot logically apply to defendants, who, by definition, have no claims and seek no relief.

There is no basis for excluding all defendants who prevail on purportedly "non-merits" grounds from the statutory authorization for fee awards. The *Christiansburg* standard aims to protect defendants from the costs of unreasonable lawsuits without unduly deterring plaintiffs from seeking their day in court. In essence, *Christiansburg* promises plaintiffs that they

will not have to pay the defendant's fees, even if they lose, so long as their decision to bring suit was "reasonable" in the first place. 434 U.S. at 422. As lower courts applying *Christiansburg* have repeatedly recognized, that decision to litigate can be unreasonable for many reasons that do not bear on the ultimate merits of the claims—including, for example, when the suit is obviously time-barred or moot. Awarding fees in such cases is entirely consistent with *Christiansburg*'s letter and logic.

By contrast, categorically denying fees in such cases would frustrate the congressional policy choice embodied in Section 706(k): to ensure that plaintiffs who impose unnecessary and unreasonable litigation costs on defendants will bear the costs of their own choices. If, as the EEOC contends, CRST prevailed on "non-merits" grounds in this case, that only confirms that Congress's concerns are fully engaged in "non-merits" cases. CRST thoroughly litigated all 67 claims at issue here, including taking the deposition of each claimant, even though the EEOC ultimately admitted that it had not investigated or found "reasonable cause" to believe that the claimants' allegations of sexual harassment were "true" before bringing suit. 42 U.S.C. § 2000e-5(b). Congress conditioned the EEOC's power to sue upon satisfaction of its pre-suit responsibilities—thereby making federal courts a last, rather than first, resort—in order to avoid burdening defendants and courts with avoidable litigation costs of this kind. Congress could not plausibly have intended to preclude a fee award, which is itself a backstop protection for defendants shouldered with unreasonable litigation

costs, when the EEOC violates these statutory safeguards. Such a rule would leave the EEOC free to disregard its pre-suit responsibilities with impunity and to attempt to coerce settlement of uninvestigated, unevaluated, and unconciliated claims through the threatened or actual imposition of massive litigation expense in federal courts.

2. Even if Congress intended Section 706(k) to limit defendants' fee awards to cases decided "on the merits," which it did not, this case would still qualify. The pre-suit requirements that the EEOC failed to satisfy here are elements of its statutory cause of action, comparable in form and function to other conditions in Title VII that the Court has already recognized as such. *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (limitation of private right of action to plaintiffs who are "aggrieved"); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (numerosity requirement for a covered "employer"). Moreover, unlike claim-processing rules that "seek to promote the orderly progress of litigation," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), Title VII's pre-suit requirements are substantive, mandatory conditions that determine whether a court may hold an employer liable in a case brought by the EEOC at all. Indeed, a central purpose of the pre-suit requirements is to prevent the EEOC from litigating cases that it has not first screened for merit and determined there is "reasonable cause" to pursue. The EEOC's claims were dismissed in this case because the EEOC failed, *inter alia*, to first determine whether the allegations that it intended to litigate had sufficient

merit to warrant requiring CRST to defend itself in court. In all of these senses, the district court decision goes directly to "the merits" of the EEOC's case.

ARGUMENT

I. Neither Section 706(k) Nor This Court's Decision In *Christiansburg* Requires That A Defendant Prevail "On The Merits" In Order To Be Awarded Fees.

In order to obtain an award of attorney's fees in a Title VII case, a litigant must clear two hurdles. First, it must qualify as a "prevailing party" within the meaning of the statute. 42 U.S.C. § 2000e-5(k). Second, because the statute provides only that the court "may" award fees to the prevailing party, a prevailing party must also establish that a fee award is warranted in its case. This Court has held that, under Section 706(k), "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg*, 434 U.S. at 417; *see Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). A district court may award fees to a prevailing defendant, however, only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg*, 434 U.S. at 421.

In this case, the Eighth Circuit imposed a new *third* hurdle for a defendant to clear, holding that no attorney's fees could be awarded with respect to the claims at issue because they were not resolved "on the merits." Specifically, it held both that CRST was "not a *prevailing party* as to these claims" because there was

no "ruling on the merits," Pet. App. 23a (emphasis added), and, additionally, that the *Christiansburg* standard could not be satisfied "'without a judicial determination of the plaintiff's case on the merits,'" *id.* at 18a (quoting *Marquart*, 26 F.3d at 852). The Eighth Circuit erred in imposing this third hurdle, which has no basis in the statute or this Court's cases and subverts the congressional policy providing for fee awards to defendants in appropriate cases.

A. Section 706(k) Authorizes An Award Of Fees To Any "Prevailing Party."

Section 706(k), like many other fee-shifting statutes, authorizes an award of attorney's fees to "the prevailing party." 42 U.S.C. § 2000e-5(k). The Eighth Circuit's conclusion that only *some* defendants who win judgments in their favor have "prevailed" is contrary to the ordinary meaning of the word and its traditional legal significance.

Indeed, it is not clear that the EEOC itself defends the Eighth Circuit's singular definition of a "prevailing party" in this Court. In the court below, the EEOC urged that CRST could not be a "prevailing party" under circuit precedent without securing a judgment "on the merits." *See* JA 105a-112a. The Eighth Circuit agreed. Pet. App. 23a. In its Brief in Opposition to Certiorari, however, the EEOC casts its victory below as an application of *Christiansburg*—with no mention of the threshold "prevailing party" inquiry—and defends the decision solely on that ground. *See* Brief in Opposition 8, 10.

In any event, the Eighth Circuit's limitation of the definition of a "prevailing" defendant to one that prevails "on the merits" is untenable. The paradigm of a "prevailing party" is "'[a] party in whose favor a judgment is rendered.'" *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603 (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). There is no question that the district court rendered judgment in favor of CRST with respect to the claims at issue here. *See* Pet. App. 215a-216a. Accordingly, CRST is the "prevailing party" with respect to those claims.

To be sure, this Court has often held that a *plaintiff* is not a "prevailing party" unless it obtains "at least some relief on the merits of [its] claim." *Hewitt*, 482 U.S. at 760. The most familiar form of "relief on the merits" is a favorable judgment, *see Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992), although other forms of victory can also suffice, *see Maher v. Gagne*, 448 U.S. 122, 129 (1980) (upholding fee award where plaintiffs settled and obtained a consent decree); *cf. Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 605 (explaining that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit," does not suffice for prevailing party status). Some relief "on the merits" is necessary for a plaintiff to prevail because the "touchstone of the prevailing party inquiry" is whether there has been a "material alteration of the legal relationship of the parties." *Sole v. Wyner*, 551 U.S. 74, 82 (2007) (quotation marks omitted). In other words, a plaintiff cannot "prevail" without prevailing "on the merits" because there is no other way for a plaintiff to secure "a

court-ordered 'chang[e] [in] the legal relationship'" with the defendant. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (brackets in original)).

Things look different from the other side of the courtroom. The defendant is not *seeking* "relief on the merits of [any] claim," *Hewitt*, 482 U.S. at 760, and the only change in the legal relationship that a defendant wants is a dismissal, with prejudice, of the plaintiff's case. Such a dismissal is "the stuff of which legal victories are made" for the defense bar. *Id.* Accordingly, there is no logical basis for excluding defendants who prevail by obtaining a dismissal with prejudice, albeit on purportedly "non-merits" grounds, from the category of "prevailing defendants."

The Eighth Circuit itself has recognized that if it used the "material alteration" standard that applies to plaintiffs, a defendant who wins a dismissal with prejudice on non-merits grounds "would technically be a prevailing party." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 851 (8th Cir. 1994). However, the court nonetheless adopted a "very narrow" definition of a "prevailing defendant" based on its sense of "the public policy conception of the role of the judiciary." *Id.* at 851-52. In so doing, the court purported to follow "lessons learned from" this Court's decision in *Christiansburg*. *Id.* at 850.

Christiansburg, however, adopted a rule of "*treating* prevailing plaintiffs and defendants differently," not *defining* those categories differently at

the threshold. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994) (emphasis added); *see Christiansburg*, 434 U.S. at 421; *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (explaining that "in *Christiansburg Garment* we held that even though the term 'prevailing party' in § 706(k) *does not distinguish between plaintiffs and defendants*, the principle [that a prevailing plaintiff should ordinarily recover fees] would not be applied to a *prevailing defendant*" (emphasis added; citation omitted)). Accordingly, there was no basis for the Eighth Circuit to impose an additional requirement for a defendant to qualify as a "prevailing party."

B. District Courts May Award Fees To Prevailing Defendants Whether Or Not They Prevail "On The Merits."

Because a defendant who obtains a judgment in its favor is plainly a "prevailing party," the central issue in this case is whether a district court has discretion to award fees to such a prevailing defendant when the decision rests on "non-merits" grounds. Nothing in the statute or in *Christiansburg* favors stripping judges of that discretion, which would serve only to undermine the important policy objectives of Section 706(k).

1. The Eighth Circuit's Rule Has No Basis In Section 706(k) And Conflicts With Christiansburg.

By its terms, Section 706(k) imposes no categorical restrictions on which prevailing parties may be awarded fees. Congress "entrust[ed] the effectuation of the statutory policy to the discretion of the district

courts." *Christiansburg*, 434 U.S. at 416. In *Christiansburg*, this Court explained that equitable considerations nonetheless counsel different standards with respect to plaintiffs and defendants. Because the private plaintiff is "the chosen instrument of Congress" to vindicate the critical policies of Title VII—and because the defendant against whom fees are awarded is, by definition, "a violator of federal law"—attorneys' fees are awarded to prevailing private plaintiffs "in all but special circumstances." *Id.* at 417-18. Fee awards to prevailing defendants, by contrast, are warranted only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation," although the court need not find "subjective bad faith." *Id.* at 421.

As the Court explained in *Christiansburg*, this standard effectuates Congress's commitments to "protect[ing] defendants from burdensome litigation having no legal or factual basis" and "'deter[ring] the bringing of lawsuits without foundation,'" *id.* at 420 (quoting 110 Cong. Rec. 13,668 (1964) (statement of Sen. Lausche)), while also ensuring that the prospect of an adverse fee award will not undercut "vigorous enforcement of the provisions of Title VII," *id.* at 422. Although the Court considered standards that would make fee awards available to defendants in even fewer cases, it squarely rejected them. Shifting the balance further in favor of plaintiffs, the Court concluded, would "distort" the adversarial process, giving plaintiffs "substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action." *Id.* at 419. As the Court noted, "many

defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights." *Id.* at 422 n.20.

The *Christiansburg* standard thus reflects this Court's considered accommodation of the competing interests that Congress sought to protect in Section 706(k). *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 762 (1980) ("[*Christiansburg*'s] distinction advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation."). Under the terms of that compromise, a defendant may recover the costs of defending itself only when it was unreasonable for the plaintiff to require the defendant to do so. *See Christiansburg*, 434 U.S. at 421-22. Put the other way, plaintiffs deciding whether to bring suit can rest assured that they will not have to pay the defendant's fees if they lose, so long as they have "reasonable ground[s] for bringing suit" in the first place. *Id.* at 422; *see id.* at 422 n.20 (directing district courts to determine "the reasonableness of the [plaintiff's] litigation efforts"); *id.* at 421, 422 (directing district courts to consider whether the "action" that the plaintiff brought was frivolous, unreasonable, or groundless).

The logic of *Christiansburg* dictates its scope. As the Court's opinion made clear, *Christiansburg* raised the bar for fee awards to defendants in order to ensure that plaintiffs with viable claims would not be deterred from seeking their day in court. *See id.* at 422; *see also Fogerty*, 510 U.S. at 524. When a lawsuit has no reasonable chance of success, however, this principle

has no application. And that is true regardless of why the lawsuit is legally untenable. What matters, in short, is the reasonableness of the *decision to litigate*, because that is the decision Congress and the Court sought to insulate from undue deterrence.

As courts have repeatedly recognized, that decision can be unreasonable for many reasons unrelated to the ultimate merits of the plaintiff's claims. *See, e.g., C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1247-48 (9th Cir. 2015) (upholding attorney's fee award under *Christiansburg* because the "outcome [was] predetermined" by the defendant's "Eleventh Amendment immunity"); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152 (4th Cir. 2014) (upholding attorney's fee award under *Christiansburg* because "the EEOC's lawsuit effectively was moot at its inception"); *Hamer v. Lake Cty.*, 819 F.2d 1362, 1370 (7th Cir. 1987) (upholding attorney's fee award under *Christiansburg* because the plaintiffs' suit was clearly barred by the Tax Injunction Act); *Hutcherson v. Bd. of Sup'rs of Franklin Cty.*, 742 F.2d 142, 146 (4th Cir. 1984) (same); *Cote v. James River Corp.*, 761 F.2d 60, 61 (1st Cir. 1985) (holding that attorney's fee award was warranted under *Christiansburg* because "it became unreasonable to continue litigation" when the plaintiff learned her claim was certainly "time-barred"); *see also Davidson v. Culver City*, 159 F. App'x 756, 759 (9th Cir. 2005) (upholding attorney's fee award under *Christiansburg* because "the result should have been obvious from the inception of this litigation . . . . [g]iven the applicability of res judicata"); *DeLeon v. Haltom City*, 113 F. App'x 577, 578 (5th Cir. 2004) (upholding

attorney's fee award under *Christiansburg* because the defendant was "unequivocally protected from liability by absolute judicial immunity").[8]

In fact, *Christiansburg* itself involved a barrier to suit far afield from the merits of any allegation of discrimination or sexual harassment—and the Court's treatment of that barrier is irreconcilable with the Eighth Circuit's interpretation of the Court's decision. In *Christiansburg*, the EEOC notified the charging party that its conciliation efforts had failed and that she had a right to sue the employer in federal court, but she did not do so. In 1972, almost two years after the EEOC sent that right-to-sue letter, Congress amended Title VII to authorize the EEOC to enforce the statute through litigation, and also permitted such suits with respect to any "'charges pending with the Commission'" on the effective date of the amendment. *Christiansburg*, 434 U.S. at 414 (citation omitted). The EEOC brought suit on behalf of the charging party, but the district court dismissed the action because the charge had not been pending on the relevant date. *Id.*

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[8] Courts similarly do not observe a "merits-only" restriction in other areas where the reasonableness of the decision to litigate is at issue. *See, e.g.*, *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987) (explaining that Rule 38 of the Federal Rules of Appellate Procedure "affords a court of appeals plenary discretion to assess 'just damages' in order to penalize an appellant who takes a frivolous appeal"); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991) (approving Rule 11 sanctions for knowingly pursuing a claim that is time-barred); *Fermin v. Nat'l Home Life Assurance Co.*, 15 F.3d 180, 1994 WL 24922, at *2 (5th Cir. 1994) (unpublished table decision) (approving Rule 11 sanctions for knowingly pursuing a claim that is barred by res judicata).

The defendant then requested an award of fees. The district court held that such an award was not justified because "'the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless,'" and the court of appeals affirmed. *Id.* at 415 (citation omitted).

After clarifying the standard for fee awards to prevailing defendants, this Court affirmed the denial of fees as well. The Court explained that by asking whether "'the Commission's action in bringing the suit could ... be characterized as unreasonable or meritless,'" the district court had correctly "focused on the standards we have discussed." *Id.* at 423 (citation omitted). In particular, the Court noted the district court's holding that the "'Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous.'" *Id.* at 423-24 (citation omitted). Of course, if the *Christiansburg* inquiry were limited to the merits of the discrimination or harassment claim, the plausibility of the EEOC's statutory analysis regarding the timeliness question would have been irrelevant. The fact that the Court approved the district court's approach is thus a powerful indication that *Christiansburg* does not require a showing that the EEOC's case was unreasonable "on the merits" in order for a prevailing defendant to win a fee award.

Christiansburg also precludes any suggestion that defendants are eligible for fee awards only when they actually have been cleared of charges of discrimination. As the Court explained, one of the two court of appeals decisions from which it drew the operative standard involved "a defendant that had successfully resisted a

Commission demand for documents." *Christiansburg*, 434 U.S. at 421 (citing *U.S. Steel Corp. v. United States*, 519 F.2d 359 (3d Cir. 1975)). Such disputes involving EEOC investigations are plainly "proceeding[s] under this subchapter [i.e., Title VII]," for which fee awards are available. 42 U.S.C. § 2000e-5(k); *see id.* §§ 2000e-8, 2000e-9. But the defendant who prevails against a demand for documents has not been exonerated of the underlying charge of discrimination.

The underlying merits of a discrimination or harassment charge are not even relevant in proceedings regarding the EEOC's use of its investigatory powers. *See* 42 U.S.C. § 2000e-8(a) (granting the EEOC "access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation"); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984) (explaining the conditions for enforcement of an EEOC administrative subpoena). The fact that both Section 706(k) and *Christiansburg* encompass such proceedings confirms that neither Congress nor the Court intended to limit defendant fee awards to cases where allegations of discrimination are resolved "on the merits." To the contrary, such a restriction would effectively nullify Congress's choice to apply Section 706(k) to "*any* action or proceeding under" Title VII, 42 U.S.C. § 2000e-5(k) (emphasis added). *See, e.g., EEOC v. Bellemar Parts Indus., Inc.*, 868 F.2d 199, 200 (6th Cir. 1989) (holding that the defendant was entitled to fees under *Christiansburg*

because "the action filed by the EEOC to enforce its subpoena in district court was groundless").

2. Imposing A "Merits-Only" Restriction On Attorney's Fee Awards Would Undermine The Policy Of Section 706(k).

"When applying fee-shifting statutes," this Court "discern[s] the limits on a district court's discretion" by looking to "the large objectives of the relevant Act." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139-40 (2005) (quotation marks omitted). The objective of Title VII's allowance for fee awards to defendants is "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420. Accordingly, grafting a merits-only restriction onto the *Christiansburg* test would be appropriate only if defending litigation that is unreasonable on non-merits grounds could not be burdensome or costly to the defendant. But that is not the case.

This case illustrates the point as well as any could. The EEOC contends that CRST did not prevail "on the merits" when it secured a dismissal of the 67 claims at issue here. As explained below, that is incorrect. *See infra* Part II. But if this case is indeed an example of "non-merits" adjudication, that only confirms that the policy rationale animating Section 706(k) applies just as forcefully to "non-merits" cases as to "merits" cases.

When in 1972 Congress authorized the EEOC to enforce Title VII through litigation, Congress retained the pre-suit requirements as a compensating limitation on the exercise of the EEOC's enforcement power. *See Shell Oil Co.*, 466 U.S. at 78. Specifically, the pre-suit

requirements—investigation, reasonable cause determination, and conciliation—serve to prevent the EEOC from imposing unjustified costs and disruption on an employer, either by litigating uninvestigated or unevaluated claims or by litigating without first attempting settlement. By establishing these threshold duties as a necessary foundation for any subsequent lawsuit, Congress sought to ensure that the EEOC's litigation authority would be limited to "legitimate, unreconcilable disputes," and would only "take over at the level where conciliations fail." 118 Cong. Rec. 588-89 (1972) (statement of Sen. Dominick); *see id.* at 7563 (statement of Rep. Perkins) (explaining that, despite its litigating authority, the EEOC would "continue to make every effort to conciliate as is required by existing law").

Here, CRST incurred millions of dollars in fees and expenses to defend against—and ultimately defeat—claims that were "without" the "foundation" that the statute requires. *Christiansburg*, 434 U.S. at 421. The EEOC put CRST to the expense of litigating these 67 claims, including depositions of the 67 claimants, even though it had not first investigated them, found "reasonable cause to believe" that they were "true," or attempted to conciliate them with CRST. 42 U.S.C. § 2000e-5(b). That is precisely what Congress sought to avoid. In fact, *both* the pre-suit requirements and the fee-shifting provision have the common purpose of avoiding this result, for each serves to shield employers from the costs of unnecessary litigation. It would be anomalous if the fee-shifting remedy—a mechanism to protect defendants from the costs of unreasonable

litigation—were categorically unavailable when the EEOC disregards the very statutory provisions that seek to protect defendants from unreasonable litigation. Two circuits have rejected that result, and a third has endorsed their position. *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982); *see also EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 469 (5th Cir. 2009).

Prohibiting fee awards to defendants under the circumstances presented here would invite the EEOC to shift the administrative costs of fulfilling its own statutory obligations to defendants and federal courts, using discovery and motion practice as substitutes for the pre-suit process required by Congress. Indeed, that is precisely what happened in this case. *See* Pet. App 188a (explaining that the EEOC did not know "on whose behalf it was seeking relief" and "was using discovery to find them"); JA 143a (finding fee award warranted because, *inter alia*, the EEOC's strategy of pursuing this litigation "contrary to the procedure outlined by Title VII" had "imposed an unnecessary burden upon CRST and the court"). The Eighth Circuit's holding gives the EEOC license to bring uninvestigated, unexamined, and unconciliated claims directly to court—leaving it to the defendant and the district judge to sort plausible from baseless claims—secure in the knowledge that the EEOC will not foot the bill because there is no fee-shifting for such "non-merits" dispositions. Likewise, the holding below endorses an EEOC strategy of attempting to coerce settlements from employers by filing an

unsubstantiated allegation that a "class" of claimants exists without ever investigating if that is in fact true. Indeed, under the Eighth Circuit's rule, there is no disincentive to such conduct by the EEOC other than expense of its own time and effort. The docket entries in this case demonstrate the extraordinary investment of time and judicial resources required of a district court when the EEOC bypasses the statutory pre-suit requirements. JA 1a-98a.

Although these dynamics are particularly acute when the EEOC does not satisfy its pre-suit obligations, they also arise in other contexts that may not go to the ultimate merits of the underlying claim. District courts should be free to determine that a plaintiff should pay the defendant's costs of litigating claims that were, for example, clearly barred by res judicata, a statute of limitations, or an ironclad immunity. *See supra* at 33-34 (collecting cases). When these dispositive flaws in the plaintiff's case are not apparent to the defendant at the outset of litigation, the defendant may incur substantial expenses defending a futile lawsuit, as CRST did here. A district court may appropriately conclude that the plaintiff's decision to litigate such claims was unreasonable—particularly if the plaintiff is a sophisticated litigant, such as the EEOC, that is well-acquainted with its obligations both before and after filing suit. *See Christiansburg*, 434 U.S. at 422 n.20 (explaining that "a district court may consider distinctions between the Commission and private plaintiffs in determining the reasonableness of the Commission's litigation efforts").

It would be better for everyone, not least the courts, if avoidable and unreasonable litigation expenses were never generated at all. But when they are, the legislative plan directs that they should be paid by the party responsible for them. That plan is grounded in considerations of both fairness and deterrence. *See Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011) (explaining that fee-shifting is appropriate because "[t]he plaintiff acted wrongly" and "the court may shift to him the reasonable costs that [his] claims imposed on his adversary" (citing *Christiansburg*, 434 U.S. at 420-21)); *Christiansburg*, 434 U.S. 420 (explaining that fee-shifting "serve[s] ... 'to diminish the likelihood of unjustified suits being brought'" (quoting 110 Cong. Rec. 6534 (statement of Sen. Humphrey))). Those statutory objectives of achieving both fairness and deterrence are fully implicated in cases like this one, whether or not the district court's dismissal constitutes a ruling on "the merits."

II. Even If Section 706(k) Could Be Read To Require That A Defendant Prevail "On The Merits," CRST Prevailed On The Merits Here.

Because CRST won a dismissal with prejudice of the 67 claims involved here, it prevailed in the only sense this Court has ever required as a condition of a fee award: it secured a material court-ordered change in the parties' legal relationship. For the reasons set out above, any further requirement that the dismissal be "merits-based" would be misguided. If such a requirement did exist, however, CRST's victory in this case would readily satisfy it. The pre-suit requirements

that the EEOC failed to satisfy in this case are elements of its statutory cause of action; they are substantive, mandatory conditions on liability; and they serve to ensure that the EEOC does not litigate cases without first investigating claims "on the merits" and determining that there is a reasonable legal and factual basis for pursuing them.

A. The Pre-Suit Requirements Are Elements Of The EEOC's Cause Of Action.

Neither the Eighth Circuit nor the EEOC has questioned the premise that, if satisfaction of the pre-suit requirements is an "element" of the EEOC's cause of action, a dismissal on that ground qualifies as a ruling on the merits. *See* Pet. App. 20a; JA 106a-107a. Because the pre-suit requirements do form elements of the EEOC's case, CRST prevailed on the merits here when it defeated these 67 claims by demonstrating that the EEOC did not investigate, find reasonable cause for, or attempt to conciliate any of these claims as required by the statute.

That conclusion follows directly from this Court's cases. First, the Court has already recognized that the "element[s] of a plaintiff's claim for relief" under Title VII extend beyond the ultimate question whether the alleged discrimination has occurred. *Arbaugh*, 546 U.S. at 509. In *Arbaugh*, the Court held that Title VII's numerosity requirement—the definition of an "employer" as an entity with 15 or more employees—does not circumscribe a court's jurisdiction, but rather forms "a substantive ingredient of a Title VII claim." *Id.* at 503.

Just like the numerosity requirement, the conditions set out in Section 706(b) should also be treated as a "substantive ingredient of a Title VII claim." *Id.* There is no basis for drawing any distinction: neither provision limits the court's jurisdiction; neither goes to the "merits" in the narrow sense of whether the complainant's allegations of discrimination are true; and the EEOC must establish both to prove its case. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1656 (2015) (explaining that a "sworn affidavit from the EEOC stating that it has performed the obligations" will usually suffice with respect to the conciliation requirement).

This Court's cases concerning private-plaintiff suits also strongly indicate that satisfaction of the three pre-suit requirements forms an "element" of the EEOC's case. As the Court has recognized, Title VII confers distinct rights of action on the EEOC and on private plaintiffs. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 325-26 (1980); 42 U.S.C. § 2000e-5(f)(1) (providing that under certain circumstances, "the Commission may bring a civil action," and under other circumstances, "a civil action may be brought . . . by the person claiming to be aggrieved"). The Court has specifically held that Title VII's cause of action for a "person claiming to be aggrieved" incorporates the zone-of-interests test into the definition of "aggrieved." *Thompson*, 562 U.S. at 177-78 (quotation marks omitted). And, as the Court recently clarified, when a right to sue is circumscribed by the zone-of-interests test, "the zone-of-interests test . . . is an element of the cause of action under the statute." *Lexmark Int'l, Inc.*

v. Static Control Components, Inc., 134 S. Ct. 1377, 1391 n.6 (2014); *see id.* at 1387-88.

Suppose, then, that a private plaintiff brings suit under Title VII, but the court determines that he or she is not "aggrieved" within the meaning of the statute. To use the example set forth in this Court's decision in *Thompson v. North American Stainless, LP*, suppose that a shareholder "sue[s] a company for firing a valuable employee for racially discriminatory reasons," alleging "that the value of his stock decreased as a consequence." 562 U.S. at 177. Under *Thompson*, that lawsuit would be dismissed because the shareholder is not "aggrieved" within the meaning of Section 706(f). *Id.* And, under *Lexmark*, that dismissal would necessarily qualify as merits-based: the plaintiff failed to satisfy an element of the applicable cause of action. 134 S. Ct. at 1391 n.6. That result makes perfect sense. Since a viable private-plaintiff case requires both an "aggrieved" employee and a covered "employer," it is not surprising that both would equally be elements of the relevant cause of action under Title VII.

The question here is no different. Just as Congress permitted a private plaintiff to sue only if he or she is "aggrieved," it permitted the EEOC to sue only if it has investigated, found reasonable cause, and "has been unable to secure from the respondent a conciliation agreement acceptable to" it. 42 U.S.C. § 2000e-5(f)(1). There is no reason why the former "aggrieved" requirement should qualify as an "element"—as it necessarily does under this Court's cases—but the latter pre-suit requirement, which appears in parallel form in the same statutory subsection, should not. In a

private-plaintiff case, the zone-of-interests test measures whether "Congress intended to permit the suit" brought by the plaintiff. *Thompson*, 562 U.S. at 178 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). In the case of an action brought by the EEOC, that same question is answered by the pre-suit requirements. The two limitations on the statutory causes of action are thus analogous in both form and function. Each requires some initial filtering depending upon the private or governmental nature of the plaintiff. Accordingly, satisfaction of the pre-suit requirements is a necessary element of the EEOC's case.

The Eighth Circuit explained its contrary holding on three grounds. First, it noted that the pre-suit requirements "do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII." Pet. App. 23a. As this Court's analysis of the zone-of-interests test indicates, however, that definition of an "element" is incompatible with settled law. Indeed, it is common for the elements of a cause of action to include not only facts establishing that the defendant has violated a statute, but also others that determine whether the plaintiff's suit against the defendant will lie. *See, e.g.*, *Lexmark*, 134 S. Ct. at 1390 (observing that "federal causes of action in a variety of contexts ... incorporate a requirement of proximate causation"). In a securities fraud case, for example, the plaintiff must prove not only that the defendant violated the Securities Exchange Act, but also that "the act or omission of the defendant alleged to violate [the Act] caused the loss for which the

plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4); *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). A private RICO plaintiff likewise must prove not only that the defendant violated the statute, but also that the plaintiff was "injured in [its] business or property by reason of [the] violation." 18 U.S.C. § 1964(c). This Court has always characterized such conditions as "elements," even though, by their own terms, they are not necessary to establish a violation of the statute. *See, e.g.*, *Dura*, 544 U.S. at 341-42; *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 285 (1992) (O'Connor, J., concurring) (describing RICO's "business or property" requirement as among "the elements of a private cause of action under RICO"); *see also United States v. Hayes*, 555 U.S. 415, 422 (2009) (defining "element" as "'[a] constituent part of a claim that must be proved for the claim to succeed'" (quoting *Black's Law Dictionary* 558 (8th ed. 2004)).

Second, the Eighth Circuit drew an analogy to *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). Its decision finds no support in *Reed*, however. In *Reed*, this Court determined that the Copyright Act's registration requirement "does not restrict a federal court's subject-matter jurisdiction." *Id.* at 157. The Court based its analysis on *Arbaugh*, which similarly concluded that Title VII's numerosity requirement does not "affect[] federal-court subject-matter jurisdiction." 546 U.S. at 503. After explaining why the Copyright Act's registration requirement satisfied the criteria set out in *Arbaugh*, *Reed* entertained the counterargument "[t]hat the numerosity requirement in *Arbaugh could be considered* an element of a Title

VII claim, rather than a prerequisite to initiating a lawsuit," and rejected the proffered distinction as immaterial to the jurisdictional question. 559 U.S. at 165-66 (emphasis added). *Reed* thus did not even affirm the accuracy of this hypothetical distinction between an element of a cause of action and a "prerequisite" to a lawsuit, let alone establish its relevance for purposes of a fee award.[9]

Finally, the Eighth Circuit declined to treat satisfaction of the pre-suit requirements as an element because these conditions apply when the EEOC brings "*any* lawsuit, not just a sexual-harassment lawsuit." Pet. App. 22a. But that point is refuted by *Arbaugh*. The numerosity requirement—the Eighth Circuit's paradigm of a Title VII element, *see id.* 20a-23a—also applies to all Title VII litigation, not only to sexual harassment suits. Yet, as all agree, numerosity is "a substantive ingredient of a Title VII claim for relief." *Arbaugh*, 546 U.S. at 503. Nothing in this Court's cases suggests that satisfaction of the pre-suit requirements should be treated any differently.

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[9] Moreover, the First Circuit has held that, under *Reed*, registration is an element of the plaintiff's cause of action under the Copyright Act. *Latin Am. Music Co. v. Media Power Grp., Inc.*, 705 F.3d 34, 42-43 (1st Cir. 2013); *Airframe Sys., Inc. v. L-3 Commc'ns Corp.*, 658 F.3d 100, 105 (1st Cir. 2011).

B. The Pre-Suit Requirements Are Not Claim-Processing Rules, But Are Mandatory, Substantive Limitations on Liability In Cases Brought By The EEOC.

Even if it were not considered an "element" of the EEOC's cause of action, satisfaction of Title VII's pre-suit requirements would remain a mandatory and substantive condition of a defendant's liability, and accordingly should be deemed a "merits" issue in any sense relevant to a fee award.

Unlike ordinary claim-processing rules that "seek to promote the orderly progress of litigation," *Henderson*, 562 U.S. at 435, Title VII's pre-suit requirements circumscribe the range of cases in which the EEOC may pursue litigation at all. Specifically, the statute mandates that the EEOC "*shall* make an investigation," and, if it finds reasonable cause, "*shall* endeavor" to conciliate with the employer. 42 U.S.C. § 2000e-5(b) (emphasis added). As the Court observed in *Mach Mining*, "[t]hat language is mandatory, not precatory." 135 S. Ct. at 1651. Only if conciliation fails "may" the EEOC bring a civil action. 42 U.S.C. § 2000e-5(f)(1); *see Occidental Life*, 432 U.S. at 368 ("[T]he EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties."). Accordingly, a court is barred from holding a defendant liable to the EEOC unless these "necessary precondition[s]" are satisfied. *Mach Mining*, 135 S. Ct. at 1651.

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), this Court considered an analogous restriction on a statutory cause of action in the Resource

Conservation and Recovery Act (RCRA). RCRA provides for citizen suits, but only if they are brought at least sixty days after giving notice of the violation to the government and the alleged violator. 42 U.S.C. § 6972(a)(1)(A), (b)(1). Applying the statutory language according to its terms, this Court held that the provision is "a mandatory, not optional, condition precedent for suit," and that it binds plaintiffs and courts alike. *Hallstrom*, 493 U.S. at 26. As the Court explained, the notice-and-delay requirements create an opportunity for a prospective defendant to "bring itself into complete compliance with the Act and thus ... render unnecessary a citizen suit"—a policy that would be "frustrated" if the Court did not give "full effect to the words of the statute" and "preserve[] the compromise struck by Congress." *Id.* at 29 (internal quotation marks omitted). The Court therefore concluded that the notice-and-delay requirements "are mandatory conditions" that "a district court may not disregard ... at its discretion." *Id.* at 31.[10]

Pre-suit conditions of this kind are not procedural formalities that determine *how* litigation unfolds, but categorical restrictions Congress has imposed on *whether* litigation (and hence liability) are permitted in the first place. In RCRA, Congress confined defendants' legal exposure to cases in which, despite notice, they persisted in violation of the statute. In

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[10] *See also United States v. Zucca*, 351 U.S. 91, 100 (1956) (holding that filing an affidavit of good cause is a mandatory prerequisite in denaturalization proceedings); *Mach Mining*, 135 S. Ct. at 1651-52 (comparing Title VII's pre-suit requirements to the conditions precedent at issue in *Hallstrom* and *Zucca*).

Title VII, it limited EEOC enforcement action to cases in which an investigation has been conducted, reasonable cause has been found, and conciliation has been tried and failed. The point of these administrative requirements is not to "promote the orderly progress" of an inevitable lawsuit, *Henderson*, 562 U.S. at 435—such as by forcing plaintiffs to bring their claims within a certain period—but to preclude some unwarranted or unnecessary lawsuits from ever being brought at all. It is in this sense that the pre-suit requirements "serve[] a substantive mission." *Mach Mining*, 135 S. Ct. at 1654. By circumscribing the universe of cases in which an employer may be held liable to the EEOC in court, they aim to "to 'eliminate' unlawful discrimination from the workplace" in the most efficient manner possible. *Id.* (quoting 42 U.S.C. § 2000e-5(b)).

This Court's cases concerning time bars also offer an instructive comparison. The apt analogy for the pre-suit requirements is a statute of repose. As the Court recently explained, such statutes differ from procedural rules like statutes of limitations that are amenable to tolling. They are inflexible and substantive restrictions that "can be said to define the scope of the cause of action, and therefore the liability of the defendant." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014). Such non-negotiable prerequisites, whether time bars or conditions precedent, are surely "procedural" in one sense of the word. But they ultimately determine whether the defendant can be held liable to the plaintiff under the terms of the statute, *see id.*, and therefore go to the merits of the claim.

C. The Pre-Suit Requirements Serve To Limit The EEOC's Enforcement Authority To Potentially Meritorious Claims, And Here The EEOC Admitted That It Did Not First Determine Whether Its Claims Were Potentially Meritorious.

The pre-suit requirements go to the merits in yet another sense. Taken together, they form "an integrated, multistep enforcement procedure" that limits the EEOC's litigation authority to investigated claims with potential merit, and then further to those that cannot readily be settled on terms acceptable to the EEOC. *Occidental Life*, 432 U.S. at 359. Compliance with this scheme is a "merits" issue because a core function of the scheme is to investigate and test cases for merit before authorizing the EEOC to sue.

In this way the pre-suit requirements resemble other threshold determinations that require an early assessment of the merits of a case. Such rules rest on the recognition that litigation is costly and that these costs should not be imposed without good cause. For example, defendants can move to dismiss for failure to state a claim, which helps to ensure that "a plaintiff with a largely groundless claim" may not undertake expansive discovery "with the right to do so representing an *in terrorem* increment of the settlement value." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted). In criminal cases, a "judicial determination of probable cause" serves an analogous function as "a prerequisite to extended restraint of liberty following arrest."

Gerstein v. Pugh, 420 U.S. 103, 114 (1975). In denaturalization proceedings, the Court has likewise insisted on "a preliminary showing of good cause" before imposing the "serious consequences" that attend the proceeding itself. *United States v. Zucca*, 351 U.S. 91, 99-100 (1956). A failure to satisfy any of these sufficient-cause thresholds is a failure to show that the case has sufficient *merit* to proceed.

In the case of a lawsuit brought by the EEOC under Title VII, Congress added another such threshold: the EEOC must ensure through an administrative investigation that there is reasonable cause for the complainant's charges before filing suit on his or her behalf. That requirement is readily explained by the legislative history of the 1972 Act, which reflects pronounced concern about "pit[ting] the overwhelming financial strength and manpower of the Federal Government" against employers who would "bear the full economic brunt of defending themselves." 118 Cong. Rec. 671 (1972) (statement of Sen. Gambrell). Although Congress rejected the most radical measures to address this concern, such as subsidizing defendants' attorney's fees in routine cases, *see id.*, it did decide to limit EEOC enforcement—unlike private enforcement, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973)—to cases where the EEOC has first investigated and found reasonable cause. *See Gen. Tel. Co. of the Nw.*, 446 U.S. at 325 ("The 1972 amendments ... expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers *reasonably suspected* of violating Title VII." (emphasis added)).

In this case, the district court's determination, affirmed by the Eighth Circuit, that the EEOC "wholly abandoned" its pre-suit obligations amounts to a ruling that, rather than investigating and determining whether the claims were potentially meritorious, the EEOC shifted the burden to CRST to show that they were not. The EEOC "did not interview any witnesses or subpoena any documents to determine whether any of [the claimants'] allegations were true." Pet. App. 107a. None of the alleged harassers was interviewed with respect to any claim. Nor did the EEOC make reasonable-cause determinations as to the 67 claims at issue here. *Id.* In fact, in 27 of the 67 cases, the alleged harassment had not yet *occurred* when the EEOC issued its Letter of Determination. *Id.* In 38 of the remaining 40 cases, "the EEOC admits that it was not even aware of the[] allegations until after the filing of the Complaint"; the EEOC had instead "used discovery in the instant lawsuit to find them." *Id.* at 108a. Because the prescribed statutory pre-suit process—including a threshold determination of reasonable cause—defines the claims that the EEOC is entitled to litigate, the EEOC did not have a "reasonable ground for bringing suit" with respect to these 67 claims. *Christiansburg*, 434 U.S. at 422.

Faced with the rare case in which the EEOC "wholly abdicated its role in the administrative process," Pet. App. 213a n.24, the district court reasonably concluded that dismissal with prejudice and an award of attorney's fees were warranted. The court noted that, in a less egregious case, it "might have stayed" the case rather than dismissing the defective

claims. *Id.* Here, however, "dismissal [was] a severe but appropriate remedy" to avoid "ratify[ing] a 'sue first, ask questions later' litigation strategy on the part of the EEOC.'" *Id.* at 214a.

The Eighth Circuit affirmed the dismissal. It explained that Title VII vest. the district court with "'discretion'" to decide whether to stay proceedings, Pet. App. 115a (quoting 42 U.S.C. § 2000e-5(f)(1)), and concluded that the district court had properly deemed dismissal a "severe but appropriate remedy" in this case, *id.* (quotation marks omitted). That holding—which is not before the Court (and as to which the EEOC chose not to seek review by this Court)—is fully consistent with the Court's recent decision in *Mach Mining*. In *Mach Mining*, the Court explained that, when a district court resolves a "limited dispute" over the adequacy of conciliation in favor of the employer, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." 135 S. Ct. at 1656. The Court in *Mach Mining* addressed only the conciliation requirement, however; it did not consider a sweeping failure by the EEOC, as here, to investigate, find reasonable cause, and attempt conciliation. *Mach Mining* did not purport to divest district courts of their remedial discretion in that or any other circumstance. Indeed, the Court explained its holding about the "appropriate remedy" in a failure-to-conciliate case by pointing to the provision of Title VII that "authoriz[es] a stay of a Title VII action for that purpose," *i.e.*, for the purpose of renewed conciliation. *Id.*; *see* 42 U.S.C. § 2000e-5(f)(1) (authorizing district courts to stay proceedings for up

to sixty days "pending ... further efforts of the Commission to obtain voluntary compliance"). In this case, by contrast, the EEOC did not just sue without attempting to "obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1). It failed to undertake any investigation or assessment of the 67 claims at issue here, suing before it had any basis to conclude even that they were claims worth conciliating. *See* 42 U.S.C. § 2000e-5(b) (directing the EEOC to attempt conciliation "[i]f the Commission determines after ... investigation that there is reasonable cause to believe that the charge is true").

In any event, as the district court explained, the effect of a stay under the circumstances presented here would simply be to "ratify" the EEOC's statutory violation. Pet. App. 214a. It would mean that, if the EEOC fails to investigate and find reasonable cause before bringing suit, it can always do so at some later point in the litigation (perhaps, as here, after the defendant has done that work through extensive discovery and numerous summary judgment motions). It would substantially increase the EEOC's leverage to coerce settlement of uninvestigated, unevaluated, and unconciliated claims if the defendant has to bear the additional costs of a "do over." This result would effectively undo Congress's decision to impose threshold requirements *before* the EEOC may bring suit, and would instead require the defendant to bear the costs of the EEOC's statutory violation.

* * *

The Eighth Circuit and the EEOC would have courts distinguish among the many ways in which a

defendant may prevail, selecting out those that go to "the merits" of the EEOC's case in order to determine whether a fee award is permissible. This approach will require courts to craft new rules to determine and explain the proper treatment of various types of claim-processing rules, conditions precedent, pleading standards, immunity defenses, and limitations on statutory coverage. The near certainty of inconsistent results counsels against starting down this path at all.

If the Court does develop a new jurisprudence of "merits-related" victories for fee-shifting purposes, however, CRST's victory here would qualify under any reasonable standard. Establishing that the EEOC has statutory authorization to sue is a necessary "element" of its claim; the restrictions represent mandatory and substantive limitations on the range of cases in which employers may be liable to the EEOC; a central purpose of the pre-suit conditions is to set a merits-based threshold for initiating litigation; and the district court concluded that the EEOC had not satisfied that threshold requirement (or the others) before litigating these claims.

In the end, this case presents a simple dilemma. If the dismissal in this case goes to "the merits," the Eighth Circuit erred in applying its own "merits-only" rule to deny CRST a fee award. And if the dismissal in this case does not go to "the merits," then it demonstrates that the Eighth Circuit's "merits-only" rule cannot be squared with the core policy of Title VII's fee-shifting provision. In either event, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 14-1375

In the Supreme Court of the United States

CRST VAN EXPEDITED, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a district court's finding that the Equal Employment Opportunity Commission failed to satisfy the administrative preconditions for filing an enforcement suit authorizes an award of attorney's fees to the defendant under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k).

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CRST VAN EXPEDITED, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 774 F.3d 1169. The opinion of the district court (Pet. App. 33a-85a) is unreported but is available at 2013 WL 3984478. An earlier relevant opinion of the court of appeals (Pet. App. 86a-163a) is reported at 679 F.3d 657.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2014. A petition for rehearing was denied on February 20, 2015 (Pet. App. 218a). The petition for a writ of certiorari was filed on May 19, 2015, and granted on December 4, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Equal Employment Opportunity Commission (EEOC or Commission) must satisfy certain administrative preconditions before bringing an enforcement suit in federal court. The question presented is whether a district court's finding that the EEOC did not satisfy those preconditions before filing a suit renders the defendant a "prevailing party" eligible for an award of attorney's fees under 42 U.S.C. 2000e-5(k). Here, that question arises in the context of unusually complex and protracted litigation stemming from the EEOC's effort to redress complaints of sexual harassment raised by hundreds of petitioner's female employees.

A. Title VII's Enforcement Scheme

1. Title VII prohibits employment discrimination based on race, sex, and other protected characteristics. 42 U.S.C. 2000e-2(a)(1). The EEOC enforces that prohibition through "a detailed, multi-step procedure" involving both administrative and judicial proceedings. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015). The process ordinarily begins when an employee or applicant for employment files a charge with the Commission alleging that an employer has violated Title VII. 42 U.S.C. 2000e-5(b). The Commission then notifies the employer and conducts an investigation. *Ibid.* If the Commission does not find "reasonable cause" to believe the allegation has merit, it dismisses the charge. *Ibid.* The charging party may then file a private suit in federal court. 42 U.S.C. 2000e-5(f)(1).

If the Commission finds reasonable cause to believe the charge is true, it must "endeavor to eliminate" the

discriminatory practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). That process of conciliation "need not involve any specific steps or measures." *Mach Mining*, 135 S. Ct. at 1654. The Commission satisfies its statutory obligation to conciliate so long as it notifies the employer of "what the employer has done and which employees (or what class of employees) have suffered as a result" and offers the employer "an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1656.

Congress left to the Commission the ultimate decision whether to enter into a conciliation agreement or to file suit. *Mach Mining*, 135 S. Ct. at 1654. If more than 30 days have elapsed since the filing of a charge and the EEOC "has been unable to secure * * * a conciliation agreement acceptable to the Commission," it may bring a civil action in federal court to eliminate the unlawful employment practice and seek relief for the aggrieved individuals. 42 U.S.C. 2000e-5(f)(1). The remedies available in such suits include injunctions, back pay, and compensatory and punitive damages. 42 U.S.C. 1981a(a)(1), 2000e-5(g)(1).

Although the Commission's enforcement process begins with the filing of a charge, "EEOC enforcement actions are not limited to the claims presented by the charging parties." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 331 (1980) (*General Tel.*). The Commission's investigations often uncover additional discrimination, and the Commission is authorized to bring suit to remedy "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *Ibid.* Such suits frequently seek relief for groups or classes of individ-

uals, such as all "female employees" adversely affected by specified policies, *id.* at 321, or "a class of women who * * * applied" for particular positions, *Mach Mining*, 135 S. Ct. at 1650. As this Court has explained, "the EEOC need look no further than [42 U.S.C. 2000e-5] for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." *General Tel.*, 446 U.S. at 324.[1]

2. The ordinary rule in American litigation is that litigants are responsible for their own attorney's fees. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Like a number of other federal statutes, Title VII creates an exception to that rule by giving district courts discretion to award fees to a "prevailing party." 42 U.S.C. 2000e-5(k). Because Title VII plaintiffs are "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," this Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-418 (1978) (citation and internal quotation marks omitted). A prevailing defendant, in contrast, may be awarded fees only if "a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The EEOC may not recover attorney's fees if it prevails as a plaintiff, but it is liable for an award of fees to a prevailing defendant "the same as a private

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[1] The EEOC is also authorized to bring a suit to remedy a "pattern or practice" of discrimination under a separate provision, 42 U.S.C. 2000e-6. That separate authority is not at issue here.

person." 42 U.S.C. 2000e-5(k); see *Christiansburg Garment*, 434 U.S. at 422 n.20.

B. The EEOC's Investigation Of Sexual Harassment Against Petitioner's Female Drivers

1. Petitioner is an interstate trucking company that employs more than 2500 drivers. Petitioner uses a team-driving system in which two drivers alternate between sleeping and driving. That system allows petitioner's trucks to stay on the road for up to 22 hours a day and allows petitioner to offer faster delivery than its competitors. But the system also requires petitioner's two-person teams to live and work together for up to 21 days at a time in the close confines of a truck cab, which consists of two front seats and a small berth area with two bunk beds. Pet. App. 88a; J.A. 397a-398a.

Petitioner's driver workforce has a high turnover rate, and petitioner hires thousands of new drivers each year. Pet. App. 177a. Petitioner provides new drivers with a few days of classroom orientation and then pairs them with experienced drivers (known as lead drivers or trainers) for 28 days of over-the-road training. *Id.* at 88a-89a. At the end of that training period, the lead driver gives the trainee a "pass/fail driving evaluation" that helps determine whether the trainee will be offered a permanent job. *Id.* at 89a.

2. Between January 2005 and October 15, 2008, petitioner received at least 182 complaints that male drivers had sexually harassed their female trainees and co-drivers—a rate of nearly one complaint per week. J.A. 445a. That means that at least "6.7% of all women driving with men" complained of sexual harassment, and petitioner also received an unknown number of additional complaints that it failed to doc-

ument. J.A. 445a-446a. In many cases, the alleged harassment was extreme—for example, dozens of petitioner's female drivers have alleged that they were sexually assaulted. J.A. 451a-455a.

Petitioner had a formal policy prohibiting sexual harassment, and it encouraged drivers who suffered harassment to report it to their dispatchers or to petitioner's Human Resources (HR) Department. Pet. App. 88a-90a. But when the two-person HR Department received a complaint, it typically did not try to determine whether the complaint was true. J.A. 540a-542a. Petitioner's responses to some complaints were documented in investigative files and summarized in a chart maintained by the HR Department, which was entitled "Positive Work Environment Communication" (PWE). Supp. J.A. 2-4 (redacted chart); see J.A. 522a.

The PWE chart indicates that petitioner's most frequent response to an allegation of harassment was a "verbal warning" to the alleged harasser (shown as "vw"). Supp. J.A. 2-4. In some cases, petitioner barred the alleged harasser from driving with women for six months (shown as "nf," for "no females"). *Ibid.*; see J.A. 529a. It appears that only one or two male drivers were fired for sexual harassment, J.A. 417a, and there is no indication of any other instance in which a male driver was placed on probation, suspended, removed from the lead-driver program, or otherwise disciplined for harassment. See J.A. 529a, 536a. Petitioner also did not check the HR Department's files to determine "whether lead driver candi-

dates ha[d] a history of sexual harassment" before assigning them to train women. J.A. 399a.[2]

3. In December 2005, Monika Starke, one of petitioner's former trainees, filed a charge with the EEOC. Pet. App. 90a-91a. She alleged that in July and August 2005, two different lead drivers sexually harassed her during her over-the-road training. *Id.* at 91a. She stated that the first driver constantly made sexual remarks, and that when Starke complained to her dispatcher she was told that she "could not get off the truck until the next day." *Ibid.* Starke alleged that her second lead driver forced her to have unwanted sex in order to receive a passing evaluation. *Ibid.*; see Supp. J.A. 44 (charge).

The Commission investigated Starke's allegations, and also sought to determine whether other female drivers were being subjected to similar treatment. Pet. App. 91a-94a. In a letter accompanying the EEOC's initial notice of the charge, the Commission asked petitioner whether, between January 2005 and

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[2] As petitioner notes (Br. 8-9), the EEOC has interpreted Title VII to prohibit trucking companies from adopting same-sex driver assignment policies. Title VII prohibits policies that "segregate" or "classify" employees in a manner that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of sex. 42 U.S.C. 2000e-2(a)(2). Because women constitute a relatively small fraction of drivers in the trucking industry, a same-sex assignment policy would result in many fewer opportunities for female drivers and would thus create an "impediment to training and employment for female drivers that male drivers d[o] not face." *EEOC* v. *New Prime, Inc.*, 42 F. Supp. 3d 1201, 1213 (W.D. Mo. 2014). For example, one trucking company's same-sex assignment policy required women seeking training "to remain on [a] waiting list for a year or more while men faced no such delay." *Ibid.*

November 2005, "any other individual ha[d] complained to any supervisor or manager concerning the conduct described in the [charge]" and directed petitioner to identify each such complainant and provide documentation about the complaint. Supp. J.A. 45-48. As the EEOC would ultimately discover during litigation, petitioner's files showed that dozens of other women had complained of harassment during the relevant timeframe. *Id.* at 2. But petitioner's response identified just two of them. *Id.* at 49-50.[3]

Despite petitioner's incomplete response, the EEOC discovered during its investigation that a number of other female drivers had complained about sexual harassment during the relevant period. Pet. App. 173a-174a & nn. 7-9. The EEOC's investigator expressed concern to petitioner about the "number of complaints," and in particular about the number of

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[3] The district court suggested that petitioner failed to reveal the dozens of other complaints in its files because the EEOC's request for information about other individuals who had complained about "the conduct described in the [charge]" was a request for information about others who had complained about the harassment suffered *by Starke*. Pet. App. 168a-169a & nn. 4-5. But that is not how petitioner itself understood the question: The two women it identified had complained that they were victimized by separate incidents of harassment. Supp. J.A. 49-50. And petitioner's omission of the dozens of other complaints in its files cannot be explained by the particular phrasing of the EEOC's question in this case. At around the same time, a different EEOC office investigating a separate charge asked petitioner "whether any complaints of sexual harassment, excluding the charging party's, have ever been made formally or informally." J.A. 537a. Petitioner responded with the same two names, and no others. J.A. 538a. Petitioner's HR Director later admitted that this response was "inaccurate" and could not explain the failure to disclose the other complaints in petitioner's records. J.A. 539a.

female trainees who alleged that lead drivers were demanding sex in exchange for passing grades. J.A. 813a. Petitioner responded with a letter representing that the number of complaints it had received was "actually quite minimal" given the size of its workforce and assuring the Commission that petitioner "promptly investigate[d] allegations of harassment and mete[d] out appropriate discipline." J.A. 814a, 816a.

4. In July 2007, the EEOC completed its investigation and sent a letter notifying petitioner that it had found reasonable cause to believe that Starke had suffered sexual harassment in violation of Title VII. J.A. 810a-812a. The letter further stated that the Commission had found "reasonable cause to believe that [petitioner] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII." J.A. 811a.

The determination letter invited petitioner to conciliate, and over the next several weeks the EEOC's investigator and petitioner's attorney discussed the possible terms of a conciliation agreement. J.A. 811a; see J.A. 281a-282a. Among other things, petitioner's attorney requested "more information regarding the class" of female drivers for whom the Commission was seeking relief. J.A. 282a. The investigator explained that she could not provide the names of all class members or give an indication of the size of the class, but that the Commission would seek an agreement requiring petitioner to "send a letter to past and present employees to help identify class members so that settlements could be paid" to women who were found to have suffered harassment. *Ibid.*[4]

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[4] Communications during conciliation ordinarily must be kept confidential. 42 U.S.C. 2000e-5(b); see *Mach Mining*, 135 S. Ct. at

Petitioner's attorney did not object to that procedure or seek further information about the class. J.A. 282a. On August 24, 2007, however, he informed the EEOC that based on the monetary demand made by Starke's private counsel, petitioner "d[id] not wish to engage in conciliation efforts" because it was "confident that conciliation will not result in a resolution of this matter." J.A. 284a; see J.A. 282a.

C. The Present Litigation

In September 2007, the Commission filed a suit in federal district court alleging that petitioner violated Title VII by subjecting Starke and "a class of similarly situated female employees" to sexual harassment in violation of Title VII. J.A. 803a-804a. Petitioner's answer asserted seven affirmative defenses, but did not specifically challenge the EEOC's compliance with Title VII's pre-suit requirements. J.A. 783a-786a; cf. Fed. R. Civ. P. 9(c). The case proceeded to discovery.[5]

1. The EEOC seeks relief for 154 women who complained of sexual harassment

From the outset, petitioner and the district court understood that the EEOC was seeking in discovery to identify women who had suffered sexual harassment. J.A. 362a-363a, 648a. Among other things, the Commission obtained the addresses of petitioner's current and former female drivers and sent them letters advising them of the suit and requesting responses from those who had suffered harassment.

1655. In this case, however, the district court permitted an inquiry into the conciliation process, and the communication between petitioner and the Commission is part of the public record.

[5] The district court allowed Starke and several other female drivers to intervene in the suit as plaintiffs. Pet. App. 2a.

J.A. 694a. Petitioner did not object to the addition of claimants, but in August 2008 it expressed dissatisfaction with the pace at which the EEOC was identifying them. J.A. 649a-650a. At petitioner's request, the court directed the Commission to identify all women for whom it sought relief by October 15, 2008. J.A. 650a-651a.

Just two weeks before that deadline, petitioner produced to the Commission the HR Department's PWE chart of sexual harassment complaints and 146 internal investigation files. J.A. 695a-696a. Those documents reflected dozens of complaints that petitioner had received before and during the Commission's administrative investigation. *Ibid.*; see Supp. J.A. 2-4. Petitioner had not disclosed the documents during the investigation, in its mandatory initial disclosures under Federal Rule of Civil Procedure 26, or in the first batch of documents it produced in response to the EEOC's specific request for investigative files. J.A. 695a-696a. Primarily because of petitioner's belated disclosure, the EEOC added a large number of women to its list of claimants in the final weeks before the October 15 deadline. J.A. 695a-696a.

After the completion of discovery, the EEOC ultimately sought relief for 154 women.[6] Although those women alleged that they had been harassed by many different male drivers, their allegations reflected common patterns of harassing conduct. For example:

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[6] The EEOC identified more than 250 claimants by the October 15 deadline, but the district court barred it from seeking relief for women who were not made available for a deposition by a particular date. Pet. App. 191a-192a.

- 42 women alleged that they were sexually assaulted. J.A. 451a-455a, 475a-476a.
- 48 women alleged that they were subjected to offensive sex-based touching. J.A. 456a-460a, 476a-477a.
- 60 women alleged that they were propositioned for sex. J.A. 461a-467a, 477a-480a.
- 19 women alleged that male drivers either threw them off of their trucks or threatened to do so. J.A. 467a-470a, 481a-482a.

2. The EEOC's claims seeking relief for 67 women survive summary judgment

After the close of discovery, petitioner filed seven motions for summary judgment. J.A. 30a-34a. None of them challenged the Commission's satisfaction of Title VII's pre-suit requirements.

a. One of petitioner's motions sought to preclude the EEOC from relying on the pattern-or-practice framework set forth in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (*Teamsters*). Under the *Teamsters* framework, the Commission must first establish that an employer engaged in a "pattern or practice" of employment discrimination. *Id.* at 360. That showing can be made on a class-wide basis, and it establishes a rebuttable presumption that individual employment actions were attributable to the unlawful pattern or practice. *Id.* at 361-362. Here, the district court precluded the EEOC from relying on the *Teamsters* framework because it held that the Commission had not established that

petitioner had a pattern or practice of tolerating sexual harassment. J.A. 350a-443a.[7]

b. Petitioner's other motions sought summary judgment on the EEOC's claims for specific women.[8] The district court granted the motions in part and denied them in part. Pet. App. 41a-43a.

Sexual harassment is actionable under Title VII if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation omitted); see Pet. App. 128a-129a. An employer's liability for such harassment depends on the position held by the harasser. An employer is vicariously liable for harassment by a supervisor unless it can establish an affirmative defense. *Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013). But if the harasser is a co-worker, the plaintiff must prove that "the employer was negligent"—that is, that the employer "knew or reasonably should have

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[7] Although a separate statutory provision authorizes the EEOC to sue to remedy a "pattern or practice" of resistance to Title VII rights, 42 U.S.C. 2000e-6, the use of the *Teamsters* framework is not limited to cases brought under Section 2000e-6. Cf. Pet. Br. 13. The *Teamsters* framework is simply a method of proving discrimination affecting a group of individuals, and every court of appeals to consider the issue has held that the Commission may "pursue a claim under the *Teamsters* pattern-or-practice framework" in a suit brought under 42 U.S.C. 2000e-5. *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013); accord *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 899 (7th Cir. 1999); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1184, 1187-1188 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982).

[8] The EEOC filed a one-count complaint seeking relief for a class. J.A. 803a-808a. The lower courts treated the Commission's request for relief for each woman as a separate "claim." Pet. App. 15a-18a, 54a-56a. This brief follows the same convention.

known about the harassment but failed to take remedial action." *Vance*, 133 S. Ct. at 2440-2441.

In this case, the district court held that petitioner's lead drivers did not qualify as "supervisors" because they lacked ultimate authority to hire or fire trainees. J.A. 208a n.2, 434a. Accordingly, the EEOC's claim seeking relief for a particular woman survived summary judgment only if the court concluded that a reasonable jury could have found, among other things, (1) that the woman suffered severe or pervasive harassment, and (2) that petitioner knew or should have known about the harassment but failed to take remedial action. Pet. App. 134a-135a; J.A. 208a-209a.

c. After the district court's summary judgment rulings, the EEOC had trial-ready claims seeking relief for 67 women. Pet. App. 192a-193a. The deposition testimony from a sampling of those women illustrates the type of conduct at issue:

- Deborah Carey testified that "ten of her fourteen co-drivers sexually harassed her," including by "fondl[ing] her while she was sleeping" and by abandoning her at a truck stop after she rebuffed a sexual advance. Carey "complained about some of this conduct early on to no avail." J.A. 196a.
- Kelli Carney testified that she was harassed by three drivers, including one who "forced sex upon [her]" multiple times and told her "that he would kill [her]" if she reported him. J.A. 683a-684a. Carney testified that she reported the rapes to the HR Department, J.A. 686a, but her complaint does not appear in petitioner's files.

- Tequila Jackson testified that, among other things, her trainer told her that "he was going to rape [her]." J.A. 504a. Jackson called a dispatcher to report the threatening behavior as it was occurring on a Friday evening, but the dispatcher told her that she would have to stay on the truck "until Monday morning." J.A. 507a. The trainer received a verbal warning. Supp. J.A. 2.
- Shalitha Ross testified that she woke up with her co-driver on top of her, fondling her breast. J.A. 608a-610a, 621a-622a. She complained to a dispatcher, but he did not believe her and initially failed to arrange for her to get off of the truck. J.A. 624a-626a, 641a. The co-driver received a verbal warning. Supp. J.A. 2.
- Gloria South testified that her trainer raped her repeatedly and prevented her from reporting him. J.A. 710a-725a. She was eventually able to get off the truck and report the rapes to petitioner's HR Director, who assured her that the trainer would be fired. J.A. 731a-734a. In fact, he received a verbal warning and a temporary "no females" designation. Supp. J.A. 3.
- Tameisha Wilson testified that a male driver "constantly propositioned [her] for sexual intercourse," "tried to grab her breasts every night," "tried to jump on top of her," "punched her in the jaw," and "tried to choke her." Wilson complained to her dispatcher, who "refused to help" and told her to "try to stick it out." J.A. 196a-197a.

3. The district court finds that the EEOC failed to satisfy Title VII's pre-suit requirements and dismisses the Commission's claims seeking relief for the remaining 67 women

The district court dismissed the EEOC's claims seeking relief for the remaining 67 women because it held that the Commission failed to satisfy Title VII's pre-suit requirements. Pet. App. 164a-217a.

a. The EEOC's compliance with its pre-suit obligations was raised for the first time in one of the district court's summary judgment orders. The court noted that petitioner had not objected, but suggested that the EEOC's identification of additional claimants during litigation was improper. J.A. 355a n.2. Instead, the court suggested that the EEOC must identify all potential claimants during its administrative investigation. J.A. 361a n.5.

Shortly thereafter, petitioner filed a motion for an order to show cause why the EEOC's complaint should not be dismissed for failure to satisfy Title VII's pre-suit requirements. J.A. 276a. The district court granted the motion and reopened discovery to allow an inquiry into the investigation and conciliation process. J.A. 278a-279a.

b. The district court then dismissed the EEOC's claims seeking relief for the remaining 67 women. Pet. App. 164a-217a. The court acknowledged that the Commission had broadened its investigation of Starke's charge to a "class" investigation and that the Commission had found reasonable cause to believe that petitioner subjected "a class of employees and prospective employees" to sexual harassment. *Id.* at 179a-180a (citation omitted). The court recognized that it could not "second-guess" that reasonable-cause

finding. *Id.* at 203a. But the court rejected the Commission's contention that it could satisfy Title VII's pre-suit requirements on a class-wide basis. The court held that the EEOC was required to investigate, make a reasonable-cause determination, and conciliate each individual woman's claim separately, and that the Commission had not done so with respect to the 67 women whose claims had survived summary judgment. *Id.* at 212a-213a.

The Commission argued that the proper remedy for any failure to satisfy Title VII's pre-suit requirements was a stay of proceedings. Cf. 42 U.S.C. 2000e-5(f)(1) (authorizing a stay to allow for conciliation). The district court disagreed, reasoning that dismissal was "a severe but appropriate remedy" given what it viewed as the EEOC's total failure to satisfy Title VII's pre-suit requirements as to the 67 remaining women. Pet. App. 214a; see *id.* at 213a n.24. The court recognized that its ruling meant that "dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom." *Id.* at 214a.

c. The district court awarded petitioner $4.5 million in attorney's fees and costs. J.A. 123a-174a. The court acknowledged that the EEOC could not be held liable for a fee award unless its claims were "frivolous, unreasonable, or without foundation." J.A. 138a (quoting *Christiansburg Garment*, 434 U.S. at 421). But the court held that "[t]he EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's prerequisites to suit." J.A. 140a. The court did not find that the EEOC's suit was unreasonable in any other respect.

4. A divided panel of the court of appeals affirms in part, reverses in part, and remands

A divided panel of the court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 86a-163a.

a. As relevant here, the court of appeals first affirmed the dismissal of the EEOC's claims based on the Commission's failure to satisfy Title VII's pre-suit requirements. Pet. App. 103a-116a. The court agreed with the district court that the EEOC was required to identify *all* claimants during its investigation and to attempt conciliation with respect to each of their claims individually. *Id.* at 106a-114a. The court further held that the district court "did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint." *Id.* at 115a.

The court of appeals also affirmed the district court's grant of summary judgment to petitioner on all but two of the remaining claims. Pet. App. 128a-152a. The court reversed the district court's grant of summary judgment on the EEOC's claims seeking relief for Starke and one other woman, Tillie Jones. *Id.* at 155a-156a. Because it had reversed in part, the court also vacated the award of attorney's fees. *Id.* at 155a.

b. Judge Murphy dissented in part. Pet. App. 156a-163a. She criticized the majority for "impos[ing] a new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim," explaining that the majority's novel rule "places unprecedented obligations on the EEOC" and "in effect rewards [petitioner] for withholding information" during the Commission's investigation. *Id.* at 156a. Judge Murphy also dissented from the court's holding that

petitioner's lead drivers did not qualify as supervisors. *Id.* at 156a-157a.

c. The court of appeals denied the Commission's petition for rehearing en banc. J.A. 14a. Judges Murphy, Bye, and Melloy voted to grant the petition. J.A. 14a-15a.

5. On remand, the parties settle the EEOC's claim seeking relief for Starke and the district court again awards attorney's fees

When the case returned to the district court, the EEOC withdrew the claim seeking relief for Jones, acknowledging that the claim was barred by the district court's order precluding the Commission from seeking relief for women who had not been identified during its pre-suit investigation. J.A. 118a. The parties then settled the Commission's sole remaining claim, which sought relief for Starke. J.A. 120a-122a. Petitioner agreed to pay $50,000, and the parties agreed to file a joint motion "to dismiss EEOC's claim on behalf of Ms. Starke with prejudice." J.A. 121a. The parties filed the required motion, and the district court entered an order dismissing the case with prejudice and incorporating the settlement agreement. J.A. 117a-122a.

The district court then granted petitioner's renewed motion for attorney's fees, awarding approximately $4.7 million in fees and costs. Pet. App. 33a-85a. Although Judge Murphy had agreed with the EEOC's position on appeal, the district court reaffirmed its finding that the EEOC's contention that it had satisfied Title VII's pre-suit requirements was "unreasonable." *Id.* at 64a-65a. Without discussing the facts of the individual claims, the court further held that "the EEOC's pattern-or-practice claim and

153 of its individual claims were unreasonable or groundless." *Id.* at 67a.

6. The court of appeals reverses and remands the fee award

The court of appeals reversed and remanded the fee award. Pet. App. 1a-32a. As relevant here, the court held that a finding that the EEOC failed to satisfy Title VII's pre-suit requirements does not authorize an award of attorney's fees to the defendant. *Id.* at 18a-24a. The court relied on circuit precedent holding that a defendant does not qualify as a "prevailing party" under 42 U.S.C. 2000e-5(k) unless it secures a "judicial determination on the merits" of the plaintiff's claim. *Marquart* v. *Lodge 837*, 26 F.3d 842, 852 (8th Cir. 1994); see Pet. App. 18a-19a. The court held that a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements is not a ruling "on the merits" because those requirements are nonjurisdictional prerequisites to filing a suit rather than elements of a Title VII claim. Pet. App. 20a-24a.

The court of appeals also vacated the remainder of the fee award. Pet. App. 24a-28a. The court held that the district court erred in making "a universal finding that all of the EEOC's claims were without foundation." *Id.* at 28a. The court explained that a district court must "make findings as to why a particular 'claim was frivolous, unreasonable, or groundless'" before awarding fees to a Title VII defendant. *Ibid.* (quoting *Christiansburg Garment*, 434 U.S. at 422).

SUMMARY OF ARGUMENT

I. A district court's finding that the EEOC failed to satisfy Title VII's administrative preconditions to filing a lawsuit does not authorize an award of attorney's fees under 42 U.S.C. 2000e-5(k) because it does not make the defendant a "prevailing party."

A. Under Title VII, as under many other fee-shifting statutes, only a "prevailing party" is eligible for an award of attorney's fees. 42 U.S.C. 2000e-5(k). This Court has held that a prevailing party is one that secures a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (*Buckhannon*). A defendant does not satisfy that test unless, at a minimum, it obtains a judgment barring further litigation on the plaintiff's claim. Absent such a judgment, the legal relationship between the parties remains materially unchanged because the plaintiff is free to refile.

B. A district court's finding that the EEOC failed to satisfy Title VII's administrative preconditions to a suit does not make the defendant a prevailing party because it does not bar further litigation on the Commission's claim. As this Court has now clarified, the proper remedy for such a failure is a stay—not a dismissal. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1656 (2015). But even where, as in this pre-*Mach Mining* case, a court dismisses an action based on a plaintiff's failure to satisfy a precondition to filing suit, it has long been settled that such a dismissal does not preclude the plaintiff from returning to court after the precondition has been met. See, *e.g.*, *Costello* v. *United States*, 365 U.S. 265, 284-288 (1961). And because such a dismissal does not protect the defend-

ant from further litigation on the same claim, it does not constitute the sort of material alteration of the parties' legal relationship required to confer prevailing-party status.

C. Petitioner appears to agree that a defendant cannot qualify as a prevailing party unless it secures a judgment foreclosing further litigation on the plaintiff's claim. But petitioner asserts (Br. 23, 29, 41) that the dismissal of the relevant claims in this case had the requisite effect because it was a dismissal "with prejudice." That characterization did not appear in the petition for a writ of certiorari, and it is incorrect. The district court's original dismissal of the relevant claims was not denominated a dismissal with prejudice, and this Court's decisions make clear that it did not have that legal effect. After the court of appeals remanded two other claims for further proceedings and the Commission withdrew one of them, the parties settled the Commission's final claim and agreed to dismiss the case "with prejudice." But that agreed-upon dismissal did not and could not modify the court's earlier dismissal of the claims at issue here, which had already been affirmed by the court of appeals.

D. Petitioner's policy arguments about the need for fee awards could not justify a departure from the clear and settled meaning of "prevailing party," and those arguments are in any event misplaced. The EEOC already has powerful incentives to conciliate and to avoid having its enforcement actions dismissed, and the marginal deterrent effect of a fee award adds little. Nor are fee awards needed to compensate defendants. Awards for failure to satisfy Title VII's pre-suit requirements are already rare, and would become

even rarer in light of this Court's guidance in *Mach Mining*. Defendants should ordinarily have little difficulty identifying and raising early in the litigation any perceived failure by the Commission to satisfy its pre-suit obligations, thus securing relief before incurring substantial attorney's fees. In this case, petitioner incurred millions of dollars in fees only because it failed to raise the issue until more than 18 months into the litigation.

II. Even if a finding that the EEOC failed to satisfy Title VII's pre-suit requirements could authorize an award of attorney's fees, this Court should affirm on the alternative ground that the award here was improper because the Commission's suit was not "frivolous, unreasonable, or groundless." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978). The courts below held that the EEOC failed to satisfy its pre-suit obligations because it did not separately investigate, make a reasonable-cause determination, and conciliate with respect to each individual woman for whom it ultimately sought relief. That novel understanding of the pre-suit requirements imposed by 42 U.S.C. 2000e-5 is contrary to longstanding practice and the decisions of other courts of appeals. It was emphatically rejected by Judge Murphy in this very case. And it has now been disapproved by this Court, which instructed that the EEOC may satisfy its conciliation obligations by identifying the "*class* of employees" for which it seeks relief. *Mach Mining*, 135 S. Ct. at 1656 (emphasis added). At a minimum, therefore, the EEOC's position that it could satisfy its pre-suit obligations on a class-wide basis was not "frivolous, unreasonable, or groundless."

ARGUMENT

I. A DISTRICT COURT'S FINDING THAT THE EEOC FAILED TO SATISFY TITLE VII'S PRE-SUIT REQUIREMENTS DOES NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. 2000e-5(k)

A defendant cannot qualify as a prevailing party eligible for an award of attorney's fees unless it has secured a "judicially sanctioned change in the legal relationship of the parties" in the form of a judgment foreclosing the plaintiff's claim. *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). A finding that the EEOC failed to satisfy Title VII's pre-suit requirements does not authorize such a judgment. Instead, like other dismissals for failures to satisfy preconditions to filing a lawsuit, a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements allows the Commission to satisfy those requirements and then return to court. And contrary to petitioner's assertion, nothing about the procedural history of this case altered the usual consequences of a dismissal for failure to satisfy a precondition to suit or rendered the dismissal here one "with prejudice."

A. A Defendant Is Not A "Prevailing Party" Eligible For An Award Of Attorney's Fees Unless It Secures A Judgment Precluding Further Litigation On The Plaintiff's Claim

1. Like many statutes containing fee-shifting provisions, Title VII allows district courts to award attorney's fees to a "prevailing party." 42 U.S.C. 2000e-5(k); see *Buckhannon*, 532 U.S. at 602-603 (collecting examples). Under such statutes, "no fee award is permissible until [a party] has crossed the 'statutory

threshold' of prevailing party status." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) (*Garland*) (citation omitted). A district court then has discretion to determine whether an award of fees is warranted under the particular circumstances of the case. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 114-115 (1992). This Court has developed different principles to guide courts' discretion in awarding fees under different fee-shifting statutes, relying on "the large objectives of the relevant Act." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139-140 (2005) (citation and internal quotation marks omitted).[9] But the threshold term "prevailing party" is "a legal term of art," and this Court has held that it should be interpreted "consistently" across the various provisions in which it appears. *Buckhannon*, 532 U.S. at 603 & n.4.

In *Buckhannon*, this Court "distilled from [its] prior cases" a two-part test for prevailing-party status. 532 U.S. at 603. To qualify as a prevailing party, a party must establish that it has achieved (1) a "material alteration of the legal relationship of the parties," *id.* at 604 (quoting *Garland*, 489 U.S. at 792-793), and (2) "judicial *imprimatur* on the change," *id.* at 605. Both elements are required. A court decision contain-

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[9] Compare *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (holding that under the fee-shifting provision of the Copyright Act, 17 U.S.C. 505, "[p]revailing plaintiffs and prevailing defendants are to be treated alike"), with *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-417, 421 (1978) (holding that under 42 U.S.C. 2000e-5(k) and other civil rights statutes, prevailing plaintiffs should ordinarily receive fee awards, but prevailing defendants may be awarded fees only if the plaintiff's claim "was frivolous, unreasonable, or groundless").

ing a favorable statement of the law "unaccompanied by 'judicial relief'" is insufficient because it does not alter the parties' legal relationship. *Id.* at 606 (emphasis omitted) (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)). And a defendant's voluntary change in conduct or a private settlement agreement may alter the parties' legal relationship, but such a change "lacks the necessary judicial *imprimatur*" to confer prevailing-party status. *Id.* at 605.

2. Although *Buckhannon* involved a plaintiff seeking prevailing-party status, "the term 'prevailing party' * * * does not distinguish between plaintiffs and defendants." *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 (1989). The same principles thus govern the application of that "legal term of art," *Buckhannon*, 532 U.S. at 603, to defendants. The courts of appeals to consider the question have uniformly agreed, holding across a range of statutes that *Buckhannon* governs prevailing-party determinations "whether the party seeking fees is a plaintiff or a defendant." *Mr. L.* v. *Sloan*, 449 F.3d 405, 407 (2d Cir. 2006) (Sotomayor, J.) (Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B)); see also, *e.g.*, *District of Columbia* v. *Straus*, 590 F.3d 898, 901-902 (D.C. Cir. 2010) (same); *Newport News Holdings Corp.* v. *Virtual City Vision, Inc.*, 650 F.3d 423, 444 (4th Cir.) (*Newport News*) (Copyright Act, 17 U.S.C. 505), cert. denied, 132 S. Ct. 575 (2011); *Cadkin* v. *Loose*, 569 F.3d 1142, 1147-1149 (9th Cir. 2009) (same), cert. denied, 559 U.S. 1007 (2010); *Riviera Distribs., Inc.* v. *Jones*, 517 F.3d 926, 928 (7th Cir. 2008) (same); *RFR Indus., Inc.* v. *Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007) (Patent Act, 35 U.S.C. 285). Accordingly, as petitioner

appears to acknowledge (Br. 28-30), a defendant "prevail[s]" under a fee-shifting provision like 42 U.S.C. 2000e-5(k) only if it achieves a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605.

3. As the courts of appeals have explained, not every court-ordered dismissal renders the defendant a prevailing party. Most obviously, a defendant who secures a dismissal without prejudice does not qualify. Such a dismissal "does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing" of the same claim at a later date. *Oscar* v. *Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008); accord, *e.g.*, *RFR Indus.*, 477 F.3d at 1353. The same logic applies when a plaintiff withdraws a claim by omitting it from an amended complaint; that step "d[oes] not alter the legal relationship between the parties because [the plaintiff] remain[s] at liberty to bring the claim again." *Newport News*, 650 F.3d at 444.

The same is true when a court dismisses for *forum non conveniens* or on another procedural ground that does not "immunize a defendant from the risk of further litigation on the merits of a plaintiff's claims." *Dattner* v. *Conagra Foods, Inc.*, 458 F.3d 98, 103 (2d Cir. 2006). In such cases, the defendant has not "achieved a judicially sanctioned change in the legal relationship of the parties" because the plaintiff "is free to pursue his claims" in another forum or at a later time. *Ibid.* see, *e.g.*, *Elwood* v. *Drescher*, 456 F.3d 943, 948 (9th Cir. 2006).

The unifying principle of those decisions is that a defendant cannot qualify as a prevailing party if it obtains a dismissal on the ground "that the plaintiff

has sued too soon, or in the wrong court, or failed to jump through a procedural hoop." *Citizens for a Better Env't* v. *Steel Co.*, 230 F.3d 923, 929-930 (7th Cir. 2000) (Easterbrook, J.), cert. denied, 532 U.S. 994 (2001). Such dismissals leave open the possibility that "the dispute will continue later, or elsewhere." *Id.* at 930. And because they do not definitively "end the litigation in the defendant's favor," such dismissals "do[] not make [the defendant] a prevailing party." *Ibid.*

4. Under *Buckhannon*, therefore, a defendant cannot qualify as a prevailing party unless it secures a court order that bars further litigation on the plaintiff's claim—ordinarily, a judgment with "claim preclusion or *res judicata*" effect. *Claiborne* v. *Wisdom*, 414 F.3d 715, 719 (7th Cir. 2005), cert. dismissed, 546 U.S. 1162 (2006); see, *e.g.*, *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038, 1057 (10th Cir. 2004) (holding that a defendant qualifies as a prevailing party where the plaintiff is "prohibited from bringing further claims on these facts"), cert. denied, 545 U.S. 1139 (2005). Petitioner's examples (Br. 33-34) of decisions awarding fees based on non-merits grounds are all consistent with that rule: Each of the underlying orders appears to have barred further litigation on the plaintiff's claim.[10]

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[10] An order precluding further litigation on the plaintiff's claim is a necessary condition for prevailing-party status, but it may not be sufficient. *Buckhannon* requires not only a change in the parties' legal relationship, but also "judicial *imprimatur* on the change." 532 U.S. at 605. Some courts have suggested that the necessary imprimatur is lacking if a dismissal with prejudice is accomplished under Federal Rule of Civil Procedure 41(a)(1), which in some circumstances permits a plaintiff or the parties jointly to dismiss a

The courts of appeals, including in the decision below, have sometimes said that a defendant must secure a judgment "on the merits" in order to qualify as a prevailing party. Pet. App. 23a; see, *e.g.*, *Latin Am. Music Co.* v. *American Soc'y of Composers, Authors & Publishers*, 642 F.3d 87, 91 (1st Cir. 2011); *Claiborne*, 414 F.3d at 719. That terminology is understandable because "[i]t is frequently said" that a judgment for the defendant has claim-preclusive effect "only if the judgment is rendered 'on the merits.'" 1 Restatement (Second) of Judgments § 19 cmt. a, at 161 (1982) (Restatement). But some judgments "not passing directly on the substance of the claim" also have claim-preclusive effect, and the Restatement therefore avoids the "on the merits" terminology "because of its possibly misleading connotations." *Ibid.*; see *Semtek Int'l, Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001).[11]

In this context, too, asking whether a judgment is "on the merits" in some abstract sense risks confusion. Instead, a court conducting a prevailing-party inquiry should ask the legally determinative question directly: Has the defendant secured a "judicially sanctioned

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case "without a court order." See, *e.g.*, *RFR Indus.*, 477 F.3d at 1353. The Court need not decide that issue here.

[11] The Eighth Circuit first articulated its "on the merits" requirement in a pre-*Buckhannon* case. See *Marquart* v. *Lodge 837*, 26 F.3d 842, 850-852 (1994). There, the Eighth Circuit predicted that this Court would not apply a "material alteration of the legal relationship" test to determine whether a defendant qualified as a prevailing party. *Id.* at 851. That aspect of *Marquart*'s reasoning is inconsistent with *Buckhannon*, which made clear that "prevailing party" is "a legal term of art" that refers to a party that has obtained a "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 603, 605.

change in the legal relationship of the parties," *Buckhannon*, 532 U.S. at 605, in the form of an order that bars further litigation on the plaintiff's claim?

B. A District Court's Finding That The EEOC Did Not Satisfy Title VII's Pre-Suit Requirements Does Not Support An Award Of Attorney's Fees Because It Does Not Preclude Further Litigation Once Those Requirements Are Met

Before bringing a suit under 42 U.S.C. 2000e-5, the EEOC must receive a charge, conduct an investigation, make a reasonable-cause determination, and "endeavor to eliminate" the alleged discrimination through conciliation. 42 U.S.C. 2000e-5(b). The statute makes the last step of that process "a necessary precondition to filing a lawsuit," *Mach Mining*, 135 S. Ct. at 1651, by specifying that the EEOC may bring an action only if it "has been unable to secure * * * a conciliation agreement acceptable to the Commission." 42 U.S.C. 2000e-5(f)(1).

In *Mach Mining*, this Court held that courts must review "the EEOC's compliance with the law's conciliation provision" in the same way that "[c]ourts routinely enforce [other] compulsory prerequisites to suit." 135 S. Ct. at 1651-1652. This Court has long held that a failure to satisfy such a prerequisite—including some of the specific prerequisites on which *Mach Mining* relied—does not bar further litigation once the prerequisite has been satisfied. A dismissal for failure to satisfy Title VII's pre-suit requirements therefore does not make the defendant a prevailing party because it does not foreclose further litigation on the Commission's claim.

1. A district court's finding that the EEOC failed to satisfy Title VII's pre-suit requirements does not bar further litigation on the Commission's claim

a. This Court's decision in *Mach Mining* makes clear that the Commission's failure to satisfy Title VII's pre-suit requirements does not foreclose further litigation on the Commission's claim. Indeed, this Court instructed that if a district court finds that the Commission failed to satisfy its obligation to conciliate before bringing a suit, the "appropriate remedy" is not to dismiss at all, but rather to stay the litigation and "order the EEOC to undertake the mandated efforts to obtain voluntary compliance." 135 S. Ct. at 1656; see 42 U.S.C. 2000e-5(f)(1) (authorizing such a stay). Such a stay obviously does not make the defendant a prevailing party within the meaning of 42 U.S.C. 2000e-5(k), and the question presented in this case thus should not arise in the future.

Petitioner asserts (Br. 54-55) that *Mach Mining*'s instruction on the proper remedy does not apply where, as here, a district court finds that the Commission failed to investigate and find reasonable cause in addition to failing to conciliate. That is incorrect, as this case illustrates. The EEOC's claims seeking relief for the 67 women at issue here have already survived summary judgment; there is unquestionably "reasonable cause" to believe that those allegations have merit. Courts have long held that employers may not challenge "the sufficiency of the EEOC's investigation" or "the evidence underlying a reasonable cause determination." *EEOC* v. *Keco Indus.*, 748 F.2d 1097, 1100 (6th Cir. 1984); see, *e.g.*, *EEOC* v. *Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). Instead, the primary purpose of those steps is "to

provide a basis for later conciliation proceedings." *Keco Indus.*, 748 F.2d at 1100. Accordingly, as the court of appeals recognized, the fact that the Commission did not individually investigate and conciliate the claims at issue here deprived petitioner—at most—of a "meaningful opportunity to conciliate" those claims on an individual basis. Pet. App. 114a. In such circumstances, the stay procedure specified in *Mach Mining* is all that is required to remedy any defect and afford petitioner the process to which it is entitled under Title VII.

b. Here, of course, the lower courts acted without *Mach Mining*'s guidance and dismissed the EEOC's claims rather than staying them. Pet. App. 115a-116a, 213a-214a & n.24. But such a dismissal does not preclude further litigation on the relevant claims. It has long been settled that a "judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied." Restatement § 20(2), at 170. Ordinarily, "[n]o more need be done" to bring a second action than "satisfy the precondition." 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4437, at 180 (2d ed. 2002); see 18 James W. Moore, *Moore's Federal Practice* § 131.30[3][b], at 131-104 to 131-105 & n.77 (3d ed. 2015) (collecting cases).

This Court and others have applied that principle in a variety of contexts. For example, in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), this Court held that an environmental suit had to be dismissed because the plaintiffs failed to comply with a statutory requirement to give notice at least 60 days before

bringing suit. *Id.* at 25-26, 33. The Court emphasized, however, that the dismissal would not have "the inequitable result of depriving [the plaintiffs] of their right to a day in court" because the plaintiffs "remain[ed] free to give notice and file [a new] suit in compliance with the statute." *Id.* at 32 (citation and internal quotation marks omitted).

Similarly, in *United States* v. *Zucca*, 351 U.S. 91 (1956), this Court held that a statute requiring the filing of an affidavit of good cause prior to the initiation of a denaturalization proceeding mandated dismissal of a proceeding that had been instituted without the requisite affidavit. *Id.* at 99-100. But the Court later held that such a dismissal did not bar the government from instituting a new denaturalization proceeding after complying with the affidavit requirement. See *Costello*, 365 U.S. at 285.

Courts of appeals have applied the same principle to Title VII's requirement that a private plaintiff obtain a right-to-sue letter from the Commission before bringing a suit. There, too, a judgment rejecting a plaintiff's claim for failure to satisfy the required pre-suit procedures "will not bar the filing of a new * * * action after [the plaintiff] exhausts his EEOC remedies." *Murthy* v. *Vilsack*, 609 F.3d 460, 466 (D.C. Cir. 2010); see, *e.g.*, *Lebron-Rios* v. *U.S. Marshal Serv.*, 341 F.3d 7, 14-15 (1st Cir. 2003); *Criales* v. *American Airlines, Inc.*, 105 F.3d 93, 96-97 (2d Cir.), cert. denied, 522 U.S. 906 (1997).

The same logic applies to the Title VII pre-suit requirements applicable to the Commission. Indeed, this Court's decision in *Mach Mining* expressly analogized those requirements to the requirement that private litigants obtain a right-to-sue letter and to the

statutory prerequisites at issue in *Hallstrom* and *Zucca*, citing each of those requirements as evidence that Title VII's conciliation requirement is judicially enforceable. See 135 S. Ct. at 1651-1652. *Hallstrom* and *Costello* thus confirm that a dismissal for failure to satisfy Title VII's pre-suit requirements does not bar the EEOC from initiating a new lawsuit on the same underlying claims so long as it satisfies its pre-suit obligations before it does so. And those decisions also confirm that refiling is permitted even where, as here, there was substantial litigation on the merits of the original suit before it was dismissed. See *Hallstrom*, 493 U.S. at 32 (original suit involved "years of litigation and a determination on the merits"); *Costello*, 365 U.S. at 267-268 (original denaturalization proceeding was litigated all the way to this Court).[12]

c. Consistent with those principles, the lower courts that have considered the issue have generally

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[12] *Mach Mining* also analogized the EEOC's conciliation obligation to the requirement that an employee file "a timely charge with the EEOC" before bringing suit. 135 S. Ct. at 1651. A holding that a plaintiff failed to file a timely charge generally forecloses further litigation on the claim. See *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 120 (2002). But that is because the requirement to file a timely charge operates as a "statute of limitations." *Id.* at 117. A plaintiff that has not filed a timely charge, like any plaintiff who files too late, cannot cure that defect after her original suit is dismissed. The dismissal therefore bars further litigation. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("The rules of finality * * * treat a dismissal on statute-of-limitations grounds * * * as a judgment on the merits."). But where, as here, a complaint is dismissed not because the plaintiff filed too late, but only because it failed to take a required step before filing, the plaintiff remains free to satisfy the requirement and bring a new action.

concluded that a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements does not preclude a subsequent action once those requirements have been satisfied. Such a dismissal "does not bar a second suit" because the Commission may "start over, conduct a proper investigation, issue a prompt notice to the [employer] if conciliation should fail, * * * and sue again." *Truvillion* v. *King's Daughters Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980); see, *e.g.*, *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981); *EEOC* v. *International Bhd. of Elec. Workers*, 506 F. Supp. 480, 482 (D. Mass. 1981); *EEOC* v. *Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1258 (M.D. Ala. 1980).

A contrary rule would have severely "inequitable result[s]." *Hallstrom*, 493 U.S. at 32. Even a dismissal without prejudice is hardly "a toothless sanction"; being forced to start the litigation over imposes significant burdens on the Commission, and in some cases the obstacles to initiating a new suit may make refiling "unlikely." *United States* v. *Taylor*, 487 U.S. 326, 342 (1988) (discussing dismissals without prejudice under the Speedy Trial Act, 18 U.S.C. 3162). As this Court recognized in *Mach Mining*, such burdens are not warranted, and the proper remedy for a finding that the EEOC failed to satisfy Title VII's pre-suit requirements is a stay, not a dismissal of any sort. But allowing such a dismissal to preclude the EEOC from returning to court after satisfying the relevant requirements would be far worse. Such a result would thwart the central purpose of Title VII by allowing unlawful employment discrimination to go unremedied and depriving meritorious claims of their "day in court." *Hallstrom*, 493 U.S. at 32 (citation omitted).

2. Petitioner's contention that Title VII's pre-suit requirements are elements of the EEOC's claim is irrelevant and mistaken

Petitioner contends (Br. 41-56) that it prevailed "on the merits" in this case because the EEOC's pre-suit obligations are "elements" of a Title VII claim or otherwise properly considered to be "merits" issues. That contention is both irrelevant and mistaken.

a. Under *Buckhannon*, the relevant question in determining whether a defendant qualifies as a "prevailing party" is not whether the ground on which it prevailed can be described as a "merits" issue or an "element" in some sense of those words. The question is whether the defendant obtained a "judicially sanctioned change in the legal relationship of the parties" in the form of an order barring further litigation on the plaintiff's claim. 532 U.S. at 605. A dismissal for failure to satisfy pre-suit requirements like those at issue here does not have that effect, regardless of how the requirements might be characterized for other purposes. For example, in contending that Title VII's pre-suit requirements should be regarded as "merits" issues, petitioner analogizes them to the mandatory pre-suit requirements at issue in *Hallstrom* and *Zucca*. Pet. Br. 48-49 & n.10. But this Court has held that those same mandatory requirements do not support a dismissal precluding further litigation. *Hallstrom*, 493 U.S. at 32; *Costello*, 365 U.S. at 285.

b. In any event, petitioner errs in asserting that Title VII's pre-suit requirements are "elements" of the EEOC's claim. Petitioner relies primarily on *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), which addressed the provision of Title VII specifying that an employer is subject to the statute only if it has 15 or

more employees. *Id.* at 504-505; see 42 U.S.C. 2000e(b). The Court held that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Arbaugh*, 546 U.S. at 516. The 15-employee rule is an element of the plaintiff's claim because a plaintiff cannot prove that an employer has violated Title VII unless it establishes that the employer is subject to Title VII in the first place.

Title VII's pre-suit requirements serve a very different function. They do not define the entities subject to Title VII, the scope of the statutory prohibition, or the parties entitled to assert a claim for relief, cf. *Lexmark Int'l, Inc.* v. *Static Controls Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). Instead, they establish *procedural* requirements that the EEOC must satisfy before filing a suit. This Court drew precisely that distinction in *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010). There, the Court distinguished between the 15-employee requirement at issue in *Arbaugh*, which "could be considered an element of a Title VII claim," and procedural "prerequisite[s] to initiating a lawsuit." *Id.* at 165-166. The Court explained that Title VII's requirement that a private litigant file an EEOC charge before bringing suit is not an element of a Title VII claim, but is instead "[a] statutory condition that requires a party to take some action before filing a lawsuit." *Id.* at 166. The Court then concluded that the Copyright Act's registration requirement is likewise a "threshold requirement[] that claimants must complete, or exhaust, before filing a lawsuit," not an element of the claim. *Ibid.*

The same logic applies to Title VII's pre-suit requirements. To confirm that conclusion, one need look no further than the allocation of issues between judges and juries. "If satisfaction of an essential element of a claim for relief is at issue * * * the jury is the proper trier of contested facts." *Arbaugh*, 546 U.S. at 514; see 42 U.S.C. 1981a(c) (providing a right to a jury trial in Title VII suits seeking money damages). But the EEOC's compliance with Title VII's pre-suit requirements has never been regarded as an issue for the jury; to the contrary, if a defendant challenges the EEOC's satisfaction of those requirements, "*a court* must conduct the factfinding necessary to decide that limited dispute." *Mach Mining*, 135 S. Ct. at 1656 (emphasis added).

C. The Unusual Procedural History Of This Case Does Not Require A Different Result

Petitioner and its amici do not appear to deny that a defendant qualifies as a prevailing party only if it secures a court order that precludes further litigation on the plaintiff's claim. And they do not attempt to explain why, as a general matter, the EEOC's failure to satisfy Title VII's pre-suit requirements would—unlike the failure to satisfy other similar preconditions to suit—preclude further litigation once those requirements have been met. Instead, petitioner's contention that it is a prevailing party is predicated on the assertion that the dismissal of the relevant claims in this case was "with prejudice."[13] That characterization did

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[13] See Pet. Br. 41 ("Because [petitioner] won a dismissal with prejudice of the 67 claims involved here, it prevailed in the only sense this Court has ever required as a condition of a fee award: it secured a material court-ordered change in the parties' legal

not appear in the petition for a writ of certiorari, and it is mistaken. The district court dismissed the relevant claims in 2009. The Eighth Circuit affirmed that dismissal, reversed the district court's judgment in other respects, and remanded for further proceedings on the EEOC's claims seeking relief for two women. After the EEOC withdrew one of the remanded claims and the parties settled the other, the parties agreed to a dismissal with prejudice. But that dismissal could not and did not alter the original dismissal of the claims at issue here, which had already been affirmed by the Eighth Circuit.

1. The district court's 2009 dismissal did not bar further litigation of the EEOC's claims

After holding that the EEOC failed to satisfy Title VII's pre-suit requirements, the district court concluded that those claims should be dismissed. Pet. App. 213a-214a & n.24. Although the court had dismissed other claims asserted by the EEOC and by the intervenors in this case "with prejudice," J.A. 273a, 311a, 442a, it did not do so here. Both the dismissal order and the subsequent judgment specify that the EEOC's complaint is "dismissed" but do not indicate that the dismissal is "with prejudice." Pet. App. 216a; 07-cv-95 Docket entry No. (Docket entry No.) 279 (Oct. 1, 2009). There is no indication that the court believed its order would preclude the EEOC from filing a new suit if it thereafter satisfied its pre-suit obligations. To the contrary, the court stated that its

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relationship."); see also *id.* at 23 ("[A] defendant who secures a dismissal with prejudice, as [petitioner] did here, is a 'prevailing party.'"); *id.* at 29 (contending that "defendants who prevail by obtaining a dismissal with prejudice" qualify as prevailing parties).

order meant that "dozens of potentially meritorious sexual harassment claims *may* now never see the inside of a courtroom," Pet. App. 214a (emphasis added), and the decision it cited as precedent for dismissing rather than staying the litigation was a dismissal "without prejudice." *Sears, Roebuck*, 490 F. Supp. at 1258, 1262; see Pet. App. 213a-214a n.24.

Petitioner does not appear to contend that the district court's 2009 dismissal was "with prejudice" or that it otherwise precluded the EEOC from returning to court if it satisfied Title VII's pre-suit requirements as to the 67 women at issue. Instead, petitioner's assertion that the relevant claims were dismissed "with prejudice" appears to rely on the district court's 2013 dismissal following remand. See Pet. Br. 17, 19. But Amicus Americans for Forfeiture Reform (AFR) asserts (Br. 16-25) that the original 2009 dismissal operated as a dismissal with prejudice under Federal Rule of Civil Procedure 41(b). That is incorrect.

Rule 41(b) allows a court to dismiss an action if a plaintiff fails to prosecute its suit or to comply with a court order. The rule specifies that "[u]nless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." Fed. R. Civ. P. 41(b). Amicus contends that because the district court's 2009 dismissal was a "dismissal not under [Rule 41]," and because it was not specifically denominated "without prejudice," it operates as an adjudication on the merits barring further litigation. AFR Amicus Br. 4, 18-21.

Amicus' argument is foreclosed by this Court's decision in *Costello*. In that case, the district court dismissed the original denaturalization proceeding because the government failed to file the required affidavit of good cause. 365 U.S. at 268. The district court specifically "declined to enter an order of dismissal 'without prejudice'" and instead "entered an order which did not specify whether the dismissal was with or without prejudice." *Ibid.* When the government brought a new denaturalization proceeding after complying with the affidavit requirement, the defendant argued that the second proceeding was barred because the earlier dismissal "must be construed to be with prejudice" under Rule 41(b). *Id.* at 284.

This Court rejected that argument, holding that "a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)." *Costello*, 365 U.S. at 285. The Court explained that "the concept of jurisdiction embodied" in Rule 41(b) is not limited to "the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter." *Ibid.* Instead, the Court relied on long-established common law principles to hold that the "lack of jurisdiction" exception in Rule 41(b) encompasses "those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim," and it held that "[f]ailure to file the affidavit of good cause in a denaturalization proceeding falls within this category." *Ibid.*

Like the affidavit requirement at issue in *Costello*, the EEOC's pre-suit obligations are "precondition[s] requisite" to a lawsuit. 365 U.S. at 285. Under *Costello*, therefore, the dismissal of the EEOC's claims for failure to satisfy those pre-suit requirements did not qualify as a dismissal "on the merits" under Rule 41(b). See 9 Charles Alan Wright et al., *Federal Practice & Procedure* § 2373, 756-758 & nn. 36-42 (3d ed. 2008) (collecting cases applying *Costello* to hold that "Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar" such as a precondition to bringing suit); see also, *e.g.*, *Lebron-Rios*, 341 F.3d at 14-15; *Criales*, 105 F.3d at 96-97; *Truvillion*, 614 F.2d at 524.

2. The district court's 2013 orders did not alter the effect of the 2009 dismissal

On appeal, the Eighth Circuit affirmed the district court's dismissal of the EEOC's complaint to the extent it rested on a finding that the Commission had not satisfied Title VII's pre-suit requirements. Pet. App. 115a-116a, 155a-156a. The court of appeals reversed the district court's grant of summary judgment on the EEOC's claims seeking relief for two women, Starke and Jones, and remanded "for further proceedings consistent with [its] opinion." *Id.* at 156a.

On remand, the EEOC voluntarily withdrew its claim seeking relief for Jones because that claim was barred by the district court's holding that the EEOC could not seek relief for any women who had not been specifically identified in the investigation and conciliation process. Docket entry No. 360 (Oct. 11, 2012). That withdrawal left the EEOC's claim seeking relief for Starke as the only live claim in the case. The parties then entered into a settlement agreement under

which petitioner agreed to pay $50,000 to settle that claim. J.A. 121a. The agreement provides that the parties "shall file a joint motion, in the form attached [to the agreement], to dismiss EEOC's claim on behalf of Ms. Starke with prejudice." *Ibid.*

Consistent with their agreement, the parties filed a joint motion "to dismiss th[e] action with prejudice." Docket entry No. 379, at 1 (Feb. 8, 2013). The same day, the district court signed an order, in the form submitted by the parties, granting the motion:

> Based on EEOC's withdrawal of its claim on behalf of Tillie Jones, the parties' settlement of EEOC's claim on behalf of Monika Starke, and the mandate issued by the Court of Appeals on September 14, 2012, with respect to all other claims asserted by EEOC, this case is DISMISSED WITH PREJUDICE.

J.A. 118a; see Docket entry No. 379-2, at 2 (Feb. 8, 2013) (proposed order). Although the order's statement that the "case" is dismissed with prejudice might be ambiguous if considered in isolation, it cannot be regarded as altering the character of the court's 2009 dismissal of the claims at issue here for at least two reasons.

First, those claims were no longer before the district court. They had been dismissed in 2009 and the court of appeals had affirmed their dismissal. The court of appeals remanded for further proceedings on other claims, but the district court had no authority to "revisit its already final determinations" that had been upheld by the court of appeals. *United States* v. *Cote*, 51 F.3d 178, 181 (9th Cir. 1995); see, *e.g.*, *Retractable Techs., Inc.* v. *Becton Dickinson & Co.*, 757 F.3d 1366, 1371 (Fed. Cir. 2014) ("Unless remanded

by [the court of appeals], all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication.") (citation omitted), cert. denied, 135 S. Ct. 1843 (2015); see also *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled."). When the district court entered the dismissal with prejudice, the only portion of the case before it was the EEOC's claim seeking relief for Starke.

Second, that understanding is confirmed by the parties' settlement agreement, which the court's dismissal order incorporated. J.A. 117a-122a. The parties agreed to file a motion "to dismiss EEOC's claim *on behalf of Ms. Starke* with prejudice." J.A. 121a (emphasis added). Nothing in the agreement reflects any intent to alter the character of the district court's dismissal of other claims more than three years earlier. And it would be particularly anomalous to hold that the agreed-upon dismissal had that effect because the parties' agreement acknowledged that they had a live dispute about whether petitioner qualified as a "prevailing party" and specified that the agreement was not intended to prejudice either party's position on that issue. J.A. 121a-122a ("[T]his agreement does not preclude either EEOC or [petitioner] from making any arguments relating to [petitioner's] pursuit of attorney's fees and costs, including arguments relating to whether EEOC or [petitioner] is the prevailing party.").

Accordingly, the 2013 dismissal of the Commission's claim seeking relief for Starke did not trans-

form the district court's 2009 dismissal of the claims at issue here into a dismissal "with prejudice."[14]

D. Petitioner's Policy Arguments Lack Merit

Petitioner contends (Br. 37-41) that awards of attorney's fees are needed to compensate defendants and deter the Commission from neglecting its pre-suit obligations. Here, as in *Buckhannon*, the Court need not consider those "policy arguments" because the case is controlled by the "clear meaning of 'prevailing party' in the fee-shifting statutes." 532 U.S. at 610. In Title VII, as in many other statutes, Congress made attorney's fees available only to a "prevailing party." 42 U.S.C. 2000e-5(k). Under Title VII, as under those other statutes, a defendant that secures a dismissal based on the plaintiff's failure to satisfy a precondition to suit is not a "prevailing party" because it has not obtained a "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. Petitioner's Title VII-specific policy arguments could not justify a departure from the settled meaning of "prevailing party." And in any event, those policy

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[14] After this Court's decision in *Mach Mining*, the EEOC filed a motion under Federal Rule of Civil Procedure 60(b) seeking relief from the district court's 2009 dismissal on the ground that *Mach Mining* had established that the Commission satisfied Title VII's pre-suit requirements in this case. Docket entry No. 414 (July 10, 2015). The district court denied the motion. Docket entry No. 441 (Dec. 14, 2015). The Commission filed a notice of appeal, which it has now withdrawn. Docket entry Nos. 445, 446 (Feb. 12 and 17, 2016). The Commission's request for Rule 60(b) relief is not inconsistent with its view that it could reassert its claims on behalf of the women at issue here by filing a new action after individually conciliating those claims. Unlike that course, Rule 60(b) relief would have reinstated the Commission's prior suit, which was ready for trial, without delay or further proceedings.

arguments are misplaced—both as a general matter and as applied to the highly unusual circumstances of this case.

1. The EEOC has powerful incentives to resolve charges through investigation and conciliation rather than litigation. Voluntary compliance requires fewer resources and ensures that unlawful employment practices are remedied faster. The Commission therefore relies on conciliation and other voluntary measures as its principal means of eliminating employment discrimination and securing relief for aggrieved individuals.

In Fiscal Year 2015, the Commission received more than 89,000 charges alleging violations of Title VII and other antidiscrimination statutes. EEOC, *All Statutes FY 1997 - FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Feb. 17, 2016). The Commission found reasonable cause in 3239 cases and successfully conciliated 1432 cases. *Ibid.* The EEOC resorts to litigation in only a "small fraction" of its cases. *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). In Fiscal Year 2015, the Commission filed just 142 merits suits—a number equal to about 4% of the cases in which it found reasonable cause. EEOC, *Litigation Statistics, FY 1997 Through FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Feb. 17, 2016).

Nor is it accurate to suggest that the Commission files suit prematurely simply to gain access to discovery under the Federal Rules of Civil Procedure. Cf. Pet. Br. 51. Unlike private parties, the Commission has broad investigative authority, including the authority to issue administrative subpoenas. 42 U.S.C. 2000e-8 to 2000e-9; see *EEOC* v. *Shell Oil Co.*, 466

U.S. 54, 63-64 (1984). The Commission thus need not resort to civil litigation just to obtain relevant records from an employer.

Finally, petitioner is quite wrong to suggest (Br. 39) that "[t]he Eighth Circuit's holding gives the EEOC license" to disregard Title VII's pre-suit requirements in future cases. The Commission invested years of time and effort in this litigation, only to be sent back to square one by the district court's dismissal order. That is not a result that the Commission has any interest in repeating, quite apart from any additional burden imposed by a fee award.

2. Petitioner also errs in suggesting that awards of attorney's fees are needed to compensate defendants who successfully persuade courts that the EEOC has failed to satisfy Title VII's pre-suit requirements. Even if this Court adopted petitioner's position, such awards would be rare. As this Court's decision in *Mach Mining* emphasized, judicial review of conciliation is extremely limited. 135 S. Ct. at 1656 (prescribing "relatively barebones review"). And even before *Mach Mining*, courts had long held Title VII defendants may not examine the sufficiency of the EEOC's investigations or ask district courts to second-guess the Commission's reasonable-cause determinations. See *Caterpillar*, 409 F.3d at 833; *Keco Indus.*, 748 F.2d at 1100.

Even if a court concluded that the EEOC had not satisfied its pre-suit obligations and further concluded (contrary to *Mach Mining*) that dismissal was the appropriate remedy, a fee award would be available only if the court also found that the Commission's belief that it had satisfied its pre-suit obligations "was frivolous, unreasonable, or groundless." *Christians-*

burg Garment, 434 U.S. at 422. Such cases would be rare: Petitioner has identified only a handful of decisions awarding attorney's fees based on the Commission's failure to satisfy its pre-suit obligations, and those decisions typically applied a degree of scrutiny that has now been rejected by this Court in *Mach Mining*. See, e.g., *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) (*Asplundh*); see also *Mach Mining*, 135 S. Ct. at 1651 n.1, 1655-1656 (disapproving *Asplundh*'s approach). Denying the defendants in those unusual cases "the extraordinary boon of attorney's fees," *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring), works no injustice.

Moreover, in the rare cases in which the EEOC unreasonably fails to satisfy its pre-suit obligations, that failure should—by definition—be readily apparent to the defendant and easily resolved without extended litigation. Petitioner emphasizes (Br. 38) that in this case it incurred "millions of dollars in fees." But it did so only because it neglected to challenge the EEOC's compliance with its pre-suit obligations until more than 18 months into this litigation, even though it was obvious from the start that the EEOC was seeking relief for women it had not identified during its pre-suit investigation. The overwhelming majority of the fee award at issue here is attributable to petitioner's litigation on the merits—efforts that left petitioner facing trial on claims seeking relief for nearly 70 women. Of the more than $4 million in fees that petitioner was awarded, it has stated that just $128,415—about 3% of the total—was incurred for litigation over the EEOC's compliance with its pre-suit obligations. Docket entry No. 416-2, at 3 (July 31, 2015). The highly unusual circumstances of this case, which are

attributable in substantial part to petitioner's own litigation decisions, make it a poor proxy for typical disputes over the Commission's compliance with Title VII's pre-suit requirements.

II. EVEN IF A COURT'S FINDING THAT THE EEOC FAILED TO SATISFY TITLE VII'S PRE-SUIT REQUIREMENTS COULD AUTHORIZE A FEE AWARD, AN AWARD IS INAPPROPRIATE HERE BECAUSE THE EEOC'S SUIT WAS REASONABLE

Even if this Court concludes that a finding that the EEOC failed to satisfy Title VII's pre-suit requirements could justify an award of attorney's fees in some circumstances, it should affirm the denial of an award in this case because the EEOC's position plainly was not "frivolous, unreasonable, or groundless." *Christiansburg Garment*, 434 U.S. at 422. The court of appeals has not yet passed on that question, but this Court may affirm "on any ground properly raised below." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); see EEOC C.A. Br. 62-78 (raising this issue). In *Farrar*, for example, this Court rejected the court of appeals' holding that a plaintiff was not a "prevailing party," but affirmed on the alternative ground that a fee award was clearly inappropriate in the circumstances of that case. 506 U.S. at 115-117.

The same is true here. The district court and the court of appeals held that the EEOC failed to satisfy its pre-suit obligations because it did not separately investigate, make a reasonable-cause determination, and conciliate on behalf of each individual woman for whom it ultimately sought relief. Pet. App. 113a-116a, 211a-213a. Those courts' statements that the EEOC "wholly failed" to satisfy its pre-suit obligations, *e.g.*,

id. at 115a-116a, rest on the premise that the Commission was required to satisfy those obligations as to each claimant individually, and could not do so on a class-wide basis. But that understanding of 42 U.S.C. 2000e-5 is contrary to a long history of the Commission's enforcement actions and the decisions of other courts. It was specifically rejected by Judge Murphy in this very case. And it has now been disapproved by this Court, which instructed that the EEOC fulfills its conciliation obligation if it identifies the "*class* of employees" for which it seeks relief. *Mach Mining*, 135 S. Ct. at 1656 (emphasis added). The Commission's conclusion that it had satisfied its pre-suit obligations on a class-wide basis was thus correct. For present purposes, however, the relevant point is that there is no sound basis for concluding that Commission's position was "frivolous, unreasonable, or groundless."

A. For decades, the EEOC has relied on 42 U.S.C. 2000e-5 to bring suits seeking relief for groups or classes that include individuals who have not yet been identified when the suit is brought. In *Mach Mining*, for example, the Commission sued on behalf of "a class of women who had * * * applied for mining jobs" with the defendant. 135 S. Ct. at 1650. Similarly, in *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318 (1980), the Commission sought relief on behalf of a class consisting of "female employees in General Telephone's facilities in the States of California, Idaho, Montana, and Oregon." *Id.* at 321.

Until the Eighth Circuit's merits decision in this case, no court of appeals had held that the EEOC is required to identify all claimants during its investigation and individually conciliate their claims, and several courts of appeals had expressly recognized that

the EEOC is "not required to provide documentation of individual attempts to conciliate on behalf of each potential claimant." *EEOC* v. *Bruno's Rest.*, 13 F.3d 285, 289 (9th Cir. 1993) (quoting *EEOC* v. *Rhone-Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989)).[15] And since the court of appeals' decision, the Sixth Circuit has reaffirmed that the EEOC may satisfy Title VII's pre-suit requirements on a class-wide basis by making the defendant aware that it "had investigated and was seeking to conciliate class-wide claims." *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 904-905 (2012), cert. denied, 134 S. Ct. 92 (2013).

B. The history of this case reinforces the reasonableness of the EEOC's belief that it had satisfied its pre-suit obligations. It was clear to petitioner from the outset that the Commission had not identified all claimants during its investigation—indeed, the Commission's investigator had told petitioner as much during conciliation. J.A. 282a. But petitioner did not raise the issue in its answer, at any time during the next year and a half of litigation, or in any of its seven motions for summary judgment. The failure of peti-

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[15] See also, *e.g.*, *Keco Indus.*, 748 F.2d at 1100 (reversing district court's holding that the EEOC could not conciliate on a class-wide basis); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1185-1186 (4th Cir. 1981) (allowing the EEOC to seek relief for claimants who applied to bank branches other than the branches that were the subject of conciliation). Many district courts have applied the same rule, including in cases like this one, where the EEOC sought relief on behalf of multiple women affected by a hostile work environment. See, *e.g.*, *EEOC* v. *Braun Elec. Co.*, No. 1:12-cv-01592, 2014 WL 1330566, at *4 (E.D. Cal. Apr. 2, 2014); *EEOC* v. *California Psychiatric Transitions*, 644 F. Supp. 2d 1249, 1272-1273 (E.D. Cal. 2009); *EEOC* v. *David Lerner Assocs.*, No. 3:05-cv-292, 2005 WL 2850080, at *3 (D. Conn. Oct. 27, 2005).

tioner's sophisticated counsel to challenge the EEOC's compliance with Title VII's pre-suit requirements until prompted to do so by the district court confirms that the EEOC did not act unreasonably.

So does the fact that Judge Murphy agreed with the EEOC, concluding that the Commission's understanding of its pre-suit obligations was not merely reasonable, but correct. Pet. App. 156a-160a. Judge Murphy sharply criticized the panel majority's "new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim," explaining that such a rule "place[d] unprecedented obligations on the EEOC" and "reward[ed] [petitioner] for withholding information from the Commission" during the investigation. *Id.* at 156a. And when the EEOC sought rehearing en banc, two of Judge Murphy's colleagues joined her in voting to rehear the case. J.A. 14a-15a. A view that attracts such support from appellate jurists should not be deemed "frivolous, unreasonable, or groundless" for purposes of a fee award.

C. This Court's subsequent decision in *Mach Mining* confirms the reasonableness of the EEOC's position. Consistent with the view adopted by the courts below in this case, the petitioner in *Mach Mining* argued that the EEOC must, among other things, "identify the particular individuals for whom it seeks [monetary] relief" in order to satisfy its conciliation obligation. Pet. Br. at 40, *Mach Mining*, *supra* (No. 13-1019). But this Court rejected "Mach Mining's bargaining checklist" and reaffirmed that the Commission can satisfy its pre-suit obligations on a class-wide basis. 135 S. Ct. at 1654. The Court explained that the Commission satisfies those obligations when

it explains to the employer "both what the employer has done and which employees (*or what class of employees*) have suffered as a result" and offers the employer "an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1656 (emphasis added); see *id.* at 1652 (stating that the Commission "must tell the employer * * * what practice has harmed which person *or class*") (emphasis added). The view of the EEOC's conciliation requirements adopted by the courts below cannot be reconciled with that express approval of a class-wide approach to conciliation. At the very least, the Commission's understanding in this case—which comports with the understanding later expressed by the Court—was not unreasonable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 2000e-2(a) provides:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. 42 U.S.C. 2000e-5 provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining wheth-

er reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with re-

spect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days

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[1] So in original. Probably should be subsection "(b)".

(provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of

the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or "the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section,

whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or

the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that

no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or per-

sons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

3. 42 U.S.C. 2000e-6 provides:

Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is

intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the

proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection

with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

4. Fed. R. Civ. P. 41 provides:

Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudica-

tion. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) **Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) **Dismissing A Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) **Cost of A Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

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IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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INTRODUCTION

1. Completely abandoning the position it took when opposing certiorari in this case, the EEOC has now disavowed the Eighth Circuit's rule requiring that a case be resolved "on the merits" as a precondition for a fee award to a prevailing defendant. Resp. Br. 29 & n.11. The EEOC now accepts that dispositions on plainly non-merits grounds—such as mootness or a time bar—can support fee awards to prevailing defendants. *Id.* at 28. As CRST argued in its opening brief, that position is correct. The Eighth Circuit's restriction of fee awards only to defendants who prevail "on the merits" has no basis in Section 706(k), conflicts with this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and undermines the statutory policy underlying fee awards. Accordingly, this Court should abrogate the Eighth Circuit's rule. As the EEOC now agrees, this rule—which formed the basis of both the decision below and the petition for certiorari—is wrong.

2. Because it now agrees that the Eighth Circuit's rule is indefensible, the EEOC's attack on the fee award in this case hinges instead on its entirely new claim that only *preclusive* judgments in favor of defendants support "prevailing party" status, and that the judgment in this case did not preclude further litigation of the 67 claims at issue. This is a truly stunning about-face. In its brief in opposition, the EEOC made *no* argument about the threshold prevailing-party requirement. *See* Pet. Br. 27 (highlighting this omission). Now it rests its case almost entirely on a *new* argument about that requirement. Because the

EEOC has not so much as mentioned its newfound principal position in six years of litigation—and indeed has numerous times contradicted it—it has unquestionably waived this argument, and the Court should not entertain it.

3. If the Court does reach the argument, however, it will find that the EEOC is wrong on both the facts and the law. Despite the EEOC's revisionist history, the record conclusively demonstrates that the district court dismissed the 67 claims at issue here with prejudice and that all parties understood the court to have done so. Such a dismissal was entirely proper given the court's conclusion—affirmed by the Eighth Circuit—that the EEOC had "abdicated" its statutory responsibility to confirm that it had valid claims before forcing CRST to spend millions of dollars defending them. The EEOC now quibbles about the language of the dismissal order and judgment, but it made no argument at the time that the dismissal should be "without prejudice." And when all claims were resolved after the first remand from the Eighth Circuit, the EEOC filed a joint motion with CRST to dismiss "this action" *with prejudice*. In any event, it is hardly as "obvious[]" as the EEOC claims that only a dismissal with prejudice can support prevailing-party status. Resp. Br. 27.

4. Because the district court's judgment in this case rendered CRST a prevailing party under any appropriate standard—and because the parties now agree that a victory "on the merits" is not required for a fee award—all that remains is the EEOC's argument that its conduct did not meet the *Christiansburg* standard. The district court, which managed this case for several

years, disagreed and found that the EEOC acted unreasonably in seeking to litigate dozens of separate and unrelated claims without first investigating them, finding reasonable cause, and attempting conciliation. That carefully considered ruling is not an abuse of the district court's discretion.

ARGUMENT

I. As The EEOC Now Concedes, The Eighth Circuit's Rule Restricting Fee Awards Only To Defendants Who Prevail "On The Merits" Is Wrong.

The central question raised in the petition for certiorari was whether the Eighth Circuit erred in holding that CRST was ineligible for attorney's fees because the claims at issue were not resolved "on the merits." Pet. 4. The Eighth Circuit's rule is misguided for all the reasons set forth in Petitioner's opening brief. Pet. Br. 26-41. It has no basis in Section 706(k), which authorizes the award of attorney's fees to *any* "prevailing party" and "entrust[s] the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg*, 434 U.S. at 416. It conflicts with this Court's decision in *Christiansburg*, which authorized the award of fees to a defendant if the plaintiff lacked "reasonable ground[s] for bringing suit." *Id.* at 422. And it is inconsistent with the statutory objectives, which include "protect[ing] defendants from burdensome litigation having no legal or factual basis." *Id.* at 420.

There is no need to dwell on these points, however, because the EEOC no longer disputes them. Despite

its prior embrace of the Eighth Circuit's rule, *see* Brief in Opposition 9-11, the EEOC now accepts that the barrier the Eighth Circuit has raised to defendant fee awards is "inconsistent with" this Court's decisions. Resp. Br. 29 n.11; *see id.* at 36. The EEOC's disavowal of the Eighth Circuit's rule is underscored by its approval of the various "decisions awarding fees based on non-merits grounds" collected in CRST's opening brief. *Id.* at 28. These include the very grounds that the decision below identified as impermissible bases for a fee award in the Eighth Circuit. *Compare* Pet. Br. 33-34, *with* Pet. App. 18a.

Accordingly, there is no longer any disagreement between the parties with respect to the central issue raised in the petition for certiorari. Because the Eighth Circuit's restriction on the range of cases in which a defendant may obtain a fee award is inconsistent with this Court's cases and frustrates the policy of Section 706(k), it should be overruled.[1]

II. The EEOC Has Waived Its Newfound Principal Argument.

Having jettisoned the rule that formed the basis for its victory below, the EEOC has invented an entirely new theory to attack the award of fees in this case. It now says (1) that a defendant "prevails" only if it secures a dismissal that precludes a future lawsuit based on the same claim, and (2) that the district court's judgment in this case did not have that effect.

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[1] If, however, the Court were to adopt the Eighth Circuit's rule, the dismissal in this case should qualify as "merits-related" for the reasons set forth in Petitioner's opening brief. Pet. Br. 41-56.

As explained below, the major premise is dubious at best, and the minor premise is clearly incorrect. *See infra* Part III. But the Court should not even entertain these contentions, because they have been waived several times over. Absent "exceptional circumstances," this Court will not "review[] a claim that was waived below." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *see* Stephen M. Shapiro et al., *Supreme Court Practice* 466-67 (10th ed. 2013) (collecting cases). There are no exceptional circumstances here, and the EEOC does not suggest any in its brief. Accordingly, it would be inappropriate to consider the EEOC's new attack on the fee award in this case at this late stage. The record conclusively shows that the EEOC waived this argument.

1. The EEOC did not contest that CRST was a "prevailing party" when, six years ago, the district court first awarded the fees at issue here. *See* JA 123a; Docket entry 295. Nor did the EEOC dispute that issue when it first appealed the fee award to the Eighth Circuit. *See* EEOC C.A. Br., 10-1682, at 92-96. In that appeal, the court affirmed the dismissal of the 67 claims, reversed two of the district court's grants of summary judgment, vacated the fee award without prejudice as a result, and remanded the case to the district court. Pet. App. 156a.

After the EEOC withdrew one of the two remaining claims, and the parties settled the other, CRST moved to reinstate the fee award as to the other 67 claims, arguing:

> CRST was the prevailing party when this Court first awarded fees because all EEOC claims had

> been dismissed with prejudice. After appeal, remand, and entry of final judgment, CRST remains the prevailing party as to all EEOC claims except one [settled] claim on behalf of Ms. Starke.

Docket entry 386-1, at 12. The EEOC did not dispute that its claims had been dismissed with prejudice, and it did not argue that such a dismissal was required for a fee award. Rather, the EEOC compared itself to the plaintiff in *Marquart v. Lodge 837, Int'l Ass'n of Machinists*, 26 F.3d 842 (8th Cir. 1994), whose complaint, it noted, was dismissed "with prejudice." Docket entry 391, at 7. "Like the *Marquart* defendant," the EEOC argued, CRST was ineligible for fees because it had not obtained a ruling that the plaintiff's discrimination claim "lacks any merit." *Id.* The district court rejected the EEOC's argument and reinstated the fee award to CRST.

2. The EEOC again appealed to the Eighth Circuit. And, again, it did not argue that CRST was not a prevailing party because it had not secured a dismissal with prejudice. Rather, the EEOC renewed its contention that the district court's "ruling does not constitute the type of merits-related decision that this Court held, in *Marquart*, is necessary." EEOC C.A. Br., 13-3159, at 50. In response, CRST argued that the pre-suit requirements *do* go to the merits of the EEOC's claim. As evidence for that proposition, CRST noted that "dismissal *with prejudice* is appropriate, as the district court and this Court held here, if EEOC has not satisfied its statutory pre-suit obligations, the defendant has been prejudiced as a result, and that prejudice cannot

be cured except through dismissal." CRST C.A. Br. 47-48 (emphasis in original). In its reply, the EEOC once again declined to contest that characterization of the dismissal in this case. Nor did it argue that a dismissal with prejudice was required for a fee award. The Eighth Circuit then reversed the fee award based on the *Marquart* rule. Pet. App. 18a-24a.

3. CRST petitioned for certiorari, asking this Court to resolve the split between the Eighth Circuit's rule permitting fees only to defendants who prevail "on the merits" and the rules of several other circuits, which permit fee awards on a number of non-merits grounds. *See* Pet. 14-17. The EEOC's brief in opposition did not make *any* argument about the "prevailing party" requirement, much less a claim that CRST could not meet this requirement because it did not obtain a dismissal with prejudice. Rather, the EEOC simply defended the Eighth Circuit's rule, which it cast not as an interpretation of the "prevailing party" requirement, but as a prerequisite for finding unreasonableness under *Christiansburg*. *See* Brief in Opposition 8, 10.

Petitioner is unaware of any case in which this Court has considered an argument that was so thoroughly and repeatedly waived. It would be enough that the EEOC did not argue this theory in the court below—or, for that matter, in its brief in opposition, *see Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002). But, in fact, the EEOC *could* not have raised this issue in the underlying appeal in this case for two reasons. First, the argument was not raised in the district court, and the Eighth Circuit ordinarily "decline[s] to consider

[an] argument for the first time on appeal." *von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 375-76 (8th Cir. 1997). Second, the issue was squarely presented by the original fee award but was not raised in the EEOC's first appeal, and the Eighth Circuit "bar[s] parties from litigating issues in a second appeal following remand that could have been presented in the first appeal." *Macheca Transp. Co. v. Phila. Indem. Ins. Co.*, 737 F.3d 1188, 1194 (8th Cir. 2013). Accordingly, the Eighth Circuit would not have considered the new argument that the EEOC advances in this Court for the first time in this eight-year-old case. That makes it particularly inappropriate to excuse the EEOC's waiver now.

III. The EEOC's Newly Invented Argument Is Wrong On Both The Facts And The Law.

The argument that the EEOC now presses in this Court for the first time is not just waived; it is wrong. The district court's dismissal of the claims at issue plainly precluded further litigation by the EEOC. And the court was fully justified in dismissing these claims with prejudice. But in any event, it is hardly clear that *only* a dismissal with prejudice can confer prevailing-party status on a defendant.

A. The District Court Dismissed The 67 Claims At Issue With Prejudice.

The district court's two judgments in this case unambiguously precluded further litigation of the EEOC's claims. After disposing of the 67 claims at issue here, which were the last remaining in the case, the court dismissed the EEOC's complaint in its entirety; desig-

nated CRST the "prevailing party"; and entered judgment for CRST. Pet. App. 216a-217a; Docket entry 279, at 1 ("Plaintiff [EEOC] takes nothing and this action is dismissed."). There should be no doubt that this disposition—which was the culmination of years of litigation that included many summary judgment decisions—precluded further litigation of the cause of action asserted in the EEOC's complaint. *See, e.g., Nevada v. United States*, 463 U.S. 110, 130-33 (1983). If there were any doubt, however, it was surely dispelled by the judgment entered after remand—to which both parties consented—expressly ordering that "this *case* is DISMISSED WITH PREJUDICE." JA 118a (emphasis added).[2] Although the judgments speak for themselves, the events surrounding them underscore that they were meant to preclude further litigation of these claims.

1. Because the EEOC's complaint did not plead separate counts for the 154 individual claims it litigated in this case, each time the district court granted summary judgment and dismissed claims, it ordered that

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[2] If the EEOC had actually believed that this second judgment violated the "mandate rule," *cf.* Resp. Br. 43-44, it plainly would not have stipulated to it. But there was no violation of the Eighth Circuit's mandate because the second judgment expressly included the dismissal of these 67 claims that the Eighth Circuit had affirmed. In any event, such a violation would only provide a basis for correction on appeal; it would not render the judgment void. The EEOC's alternative argument that the 67 claims were no longer part of the "case" is also mistaken. These claims were never severed, and in fact the judgment was expressly predicated on the prior disposition of "all other claims asserted by EEOC." JA 118a; *see* Docket entry 379, at 1 (joint motion).

"[t]he EEOC is BARRED from seeking relief in this action on behalf of" the relevant individuals. JA 311a; *see, e.g., id.* at 204a, 221a. These "barrings" were clearly preclusive of further litigation by the EEOC. Indeed, when the same ground applied both to individual interveners and to the EEOC's pursuit of some of its claims, the interveners were "DISMISSED WITH PREJUDICE," and the EEOC was "BARRED" from seeking relief on behalf of the relevant claimants. *E.g., id.* at 273a, 311a.

2. After the district court ruled that the EEOC had never had even *prima facie* evidence of a class-wide pattern or practice, CRST sought to dismiss the EEOC's remaining allegations for failure to satisfy the pre-suit requirements. In essence, CRST argued that the EEOC had unfairly brought hundreds of individual, fact-bound claims in the guise of a "'class of similarly situated female employees.'" Docket entry 222-2, at 4. Because there was never a reasonable basis for any class-wide theory of liability, the EEOC had essentially used that theory as a pretext to bypass the pre-suit requirements as to all but two of its myriad individual allegations. On this basis, CRST "ask[ed] that the case be dismissed," and that "as far as the EEOC is concerned, ... it be dismissed with prejudice." Docket entry 254, at 30-31.

After holding an evidentiary hearing, the district court fully embraced CRST's position. As the court explained, it was presented with an "exceptionally rare" case in which the EEOC had "wholly abandoned its statutory duties." Pet. App. 204a. The court went on to describe as "prophetic" concerns that such lapses

could "'equate to more frivolous suits reaching the courts'" and "'increase[] the time and expense of discovery and trials.'" *Id.* at 210a n.23. As the district judge remarked, she had "been in the business a long time," but she had "never had a case brought by a government agency that was such a mess." Docket entry 254, at 16-17.

The court therefore "BAR[RED]" the EEOC from pursuing its allegations on behalf of the remaining claimants—just as it did when dismissing an intervener's claim with prejudice. Pet. App. 215a. The court explained that it "might have stayed the instant action for further conciliation in lieu of dismissal" if the EEOC had not "wholly abdicated its role in the administrative process." *Id.* at 213a n.24. But in this case, it concluded, "dismissal is a severe but appropriate remedy." *Id.* at 214a. As the court explained: "Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's 'integrated, multistep enforcement procedure.'" *Id.*[3] In short, the court concluded that through its

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[3] Notably, the EEOC has completely reversed its interpretation of this statement. In this Court, the EEOC stresses the word "*may*." Resp. Br. 40. But in its original appeal, it took exactly the opposite position, and actually replaced the word "may" with an ellipsis. *See* EEOC C.A. Br., 10-1682, at 66-67 ("The court recognized dismissal as a 'severe' remedy and *acknowledged it would* result in 'dozens of potentially meritorious sexual harassment claims . . . never see[ing] the inside of a courtroom.'" (alterations in original; emphasis added)). This contradiction is not explained or even acknowledged in the EEOC's brief. However, it is clear that the

statutory abdication the EEOC had forfeited its right to litigate its claims against CRST. And, as the stipulated judgment that the EEOC co-sponsored demonstrates, the EEOC has, until now, always acknowledged that fact.

3. Thus, in its first appeal, the EEOC argued that "[t]he court erred in *preventing EEOC from seeking relief* for multiple victims of discrimination," thereby "permitting rampant sexual harassment to go unremedied." EEOC C.A. Br., 10-1682, at 63, 67 (emphasis added). Such statements are inexplicable if the EEOC thought it could simply start over.

The EEOC's motion to reopen the district court's judgment after this Court's decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), is also revealing. Seeking relief under Rule 60(b)(6), the EEOC argued that the judgment should be vacated because "EEOC *has not been able* to obtain a determination on the merits of [its] claims from a jury." Docket entry 414-1, at 10 (emphasis added); *see id.* at 13 (similar). Under the EEOC's new theory, that representation to the district court was flatly wrong; the EEOC could have immediately opened investigations, found reasonable cause, and offered to conciliate. It simply chose—for

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court used the word "may" simply to signify that, although the EEOC's action was permanently barred, the decision did not address whether *individuals* could bring suit in their own names, as several had through intervention. *See* Pet. App. 194a n.18.

unexplained reasons—to abandon its "trial-ready claims." Resp. Br. 14.[4]

It appears that, finding the Eighth Circuit's "on the merits" holding indefensible but unwilling to concede that the Eighth Circuit's decision cannot stand, the EEOC has chosen to engage in revisionist history—contending that the dismissal of these 67 claims, which it vehemently opposed in the district court, appealed unsuccessfully in the Eighth Circuit, and then recently sought to vacate, was merely a procedural inconvenience. The record makes perfectly clear, however, that the court's judgment barred further litigation of the EEOC's claims.

B. The District Court Was Fully Justified In Dismissing The EEOC's Claims With Prejudice.

Because the district court dismissed the EEOC's claims with prejudice, the EEOC's argument ultimately depends on the notion that the court was somehow legally incapable of doing so. Again, because that argument has been waived, this Court should not consider it. But it, too, is mistaken.

1. A dismissal with prejudice has long been accepted as a permissible remedy when a plaintiff's failure to satisfy a condition precedent is its own fault and per-

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[4] It is also telling that the EEOC withdrew its notice of appeal from the denial of its Rule 60 motion only one day before filing its brief in this Court. *See* Docket entry 446. One might infer that the EEOC appreciates that its old and new positions are irreconcilable.

mitting a new lawsuit would be unfair. Indeed, the very authorities cited by the EEOC make this clear. *See* 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4437, at 185 (2d ed. 2002) (noting that "special circumstances may make it manifestly unfair to permit a second action after satisfying a precondition that easily could have been satisfied at the time of the prior action" (internal quotation marks omitted)); *Restatement (Second) of Judgments* § 20 cmt. n, at 177 (1982).

Here, the decision to dismiss with prejudice was justified by the fact that the EEOC "wholly abdicated its role in the administrative process." Pet. App. 213a n.24. As the district court recognized, Congress made that process a *pre-suit* requirement in order to shield employers from the costs of avoidable or unwarranted litigation. Accordingly, it would have made little sense to dismiss without prejudice in this case; the EEOC's actions had already "foreclosed any possibility that the parties might settle all or some of this dispute *without the expense of a federal lawsuit.*" *Id.* at 211a (emphasis added). The EEOC could not be permitted to "cure" its abdication merely by starting over again, leaving CRST with millions of dollars of fees and expenses accrued over years of unwarranted litigation.[5] Thus, as

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[5] As the district court explained, the EEOC's argument that CRST was to blame for these costs because it did not raise the alarm sooner "is without merit." JA 154a. CRST moved to strike many of the EEOC's claims at the outset of the case on the basis that EEOC could not have investigated them or made reasonable-cause findings. *Id.* The court denied that motion in reliance on the EEOC's "represent[ation] that 'it had a good faith belief that each and every one . . . ha[d] an actionable claim for sex discrimina-

the district court concluded, allowing further litigation—at least by the EEOC—would have "ratif[ied] a 'sue first, ask questions later' litigation strategy." *Id.* at 214a. In cases of this kind, a dismissal with prejudice is an appropriate response. *See, e.g., Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 937-38 (4th Cir. 1975); *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970) (en banc).[6]

2. For the same reason, the EEOC's reliance on *Costello v. United States*, 365 U.S. 265 (1961), is misplaced. *Costello* reasoned that whether a particular kind of dismissal "operates as an adjudication on the merits," Fed. R. Civ. P. 41(b), should depend on whether "the policy" of Rule 41(b) applies. 365 U.S. at 286. Failure to file an affidavit of good cause in a denaturalization proceeding, the Court explained, does not implicate that policy because "[t]he defendant is not put to the necessity of preparing a defense." *Id.* at 287. In

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tion.'" *Id.* However, the court cautioned the EEOC that if its representation turned out to be false, as it did, CRST could seek relief. Thus, CRST did not sleep on its rights; rather, both CRST and the court were misled at the outset.

[6] The EEOC's discredited argument (Resp. Br. 7-8) that its investigation was hampered by CRST's failure to provide all information that the EEOC requested was long ago correctly rejected by the district court after an evidentiary hearing on CRST's motion that these 67 claims be dismissed. The court found CRST had responded fully to EEOC's information requests. Pet. App. 167a-180a; *see* Docket entry 153, at 14 (rejecting the EEOC's argument regarding timing of discovery). Although the EEOC renewed its contention on appeal, the Eighth Circuit found no basis for blaming CRST for the narrow scope of the EEOC's investigation. Pet. App. 105a-113a.

this case, by contrast, CRST *was* required to "incur the inconvenience of preparing to meet the merits," *id.* at 286, by deposing 154 claimants and filing several summary judgment motions. *Costello* is therefore entirely consistent with the rule that a court may decide to dismiss with prejudice in cases like this one.[7] Indeed, *Costello* noted that the district court in that case had declined to address the prejudice question, *id.*, whereas the court in this case made a decision to dismiss with prejudice based on the very circumstances credited in *Costello*.

Accordingly, the district court acted well within its authority in dismissing the EEOC's claims with prejudice.

C. The Court Should Not Adopt The EEOC's Position That Only A Dismissal With Prejudice Confers "Prevailing Party" Status.

Because the EEOC's "dismissal without prejudice" argument is both waived and mistaken, the Court need not address the EEOC's assertion that a dismissal without prejudice "obviously" would not suffice to make a defendant a prevailing party. Resp. Br. 27. In fact, however, the lower courts are divided on this question, with several rejecting the EEOC's position.[8]

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[7] *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989), is inapposite for similar reasons; there was no allegation that the plaintiff abused the statutory process or that further litigation would be unfair.

[8] *See, e.g., Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 46 (1st Cir. 2010); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 471 n.10 (3d Cir. 2000); *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 458

Were the Court to address this issue, it should not hold that a defendant can only "prevail" when it secures a dismissal with prejudice.

As this Court has explained, "prevailing party" is a "legal term of art" that refers, in its paradigm case, to "'[a] party in whose favor a judgment is rendered.'" *Buckhannon*, 532 U.S. at 603. And a judgment dismissing a case "without prejudice" is nonetheless a final judgment that resolves that case in favor of the defendant. *See United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); *Ciralsky v. CIA*, 355 F.3d 661, 666-67 (D.C. Cir. 2004) (collecting cases). Accordingly, it would be perfectly logical to hold that a defendant prevails in an "action or proceeding," 42 U.S.C. § 2000e-5(k), by securing a final judgment disposing of the case and affording the plaintiff no relief. Moreover, the statutory policy of awarding fees in appropriate circumstances to a prevailing defendant may require such an award even when a plaintiff is not barred from refiling its claims. For these reasons, the Court should not lightly adopt the EEOC's newly fashioned contention that *only* a dismissal of a case with prejudice can support "prevailing defendant" status.

IV. The District Court Did Not Abuse Its Discretion In Awarding Fees.

In its final gambit to avoid a loss on the question presented, the EEOC urges this Court to affirm on a ground the EEOC acknowledges the court of appeals never reached—that the district court abused its

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(10th Cir. 1995) (en banc); *see also J.G.T., Inc. v. Ashbritt, Inc.*, 459 F. App'x 333, 334 (5th Cir. 2012) (applying state law).

discretion in finding that the EEOC's failure to fulfill its statutory obligations rendered its lawsuit "frivolous, unreasonable, or groundless" under *Christiansburg*. Resp. Br. 49. But the district court properly exercised its broad discretion in finding that standard satisfied here. The court's fee award was based on its extensive first-hand knowledge of how the parties litigated this case, and there is no reason to overturn its considered judgment. Nor, after a "'second major litigation'" over fees extending now to four years, should CRST be required to further litigate this issue. *See Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011).

The district court found that the EEOC's actions were "unreasonable" because they were "contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court." Pet. App. 64a; *accord* JA 143a.[9] Indeed, as recounted above, *supra* at 10-12, the court expressed dismay that any "government agency" would make "such a mess" of a case. *Cf. Christiansburg*, 434 U.S. at 422 n.20 (inviting district courts to "consider distinctions between the Commission and private plaintiffs"). The court was entirely correct to find that the EEOC's "end-run around Title VII's statutory prerequisites" rendered the ensuing lawsuit unreasonable. JA 142a.

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[9] The EEOC has conceded that it did not investigate, find reasonable cause for, or attempt to conciliate 152 of its 154 individual claims. JA 100a-101a. Thus, although CRST won summary judgment with respect to 80 of those claims, it should never have been required to litigate them.

The crux of the EEOC's response, which was rejected by both the district court and the Eighth Circuit, is that its failure to fulfill the pre-suit requirements for these 67 claims cannot have been unreasonable because the EEOC regularly brings claims on behalf of a class "that include[s] individuals who have not yet been identified when the suit is brought." Resp. Br. 50. But while the EEOC certainly may bring claims on behalf of classes that include unidentified individuals, it cannot do so when the "class" is simply a placeholder for an open-ended set of unrelated individuals with particularized grievances. If such "class" claims were permitted, the pre-suit investigation, reasonable-cause, and conciliation requirements would be meaningless.

Accordingly, although the EEOC may pursue class claims, it must first investigate, find reasonable cause, and conciliate with respect to the *specific discriminatory practices* that are alleged to affect, and thereby delimit, the class. The EEOC has long understood this requirement. *See* EEOC Br. in *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, *available at* 1980 WL 339554, at *12-13. The EEOC never did that in this case. Instead, the EEOC used a single charge of discrimination involving highly individualized facts as a springboard from which to litigate on behalf of an unbounded "class of similarly situated female employees." JA 792a-793a. As quickly became clear, the EEOC's understanding of "similarly situated" encompassed *any* allegation of sexual harassment based on any set of facts and any legal theory, when there was no evidence of any common pattern or practice affecting all members of the class.

Tellingly, the EEOC did not even allege a common pattern-or-practice claim in its complaint. Nor did the EEOC attempt to conciliate on behalf of a class defined by any common practice; rather, it explicitly informed CRST that it was "not able to provide" even "an indication of the size of the class." JA 282a. The district court then specifically found that there was no common pattern or practice tying the EEOC's disparate individual claims together, holding there was "nothing in the record which a reasonable jury might cobble together to show . . . a pattern or practice of tolerating sexual harassment instead of merely isolated or sporadic failures." JA 435a. The EEOC thus never investigated or found reasonable cause as to any class-wide discriminatory practice during the course of its investigation, nor attempted conciliation on behalf of a class.

That is what distinguishes this case from those on which the EEOC relies. *Mach Mining*, unlike this case, was about a common discriminatory practice allegedly affecting an identifiable class. There, the EEOC brought a pattern-or-practice claim under Section 707 after investigating and finding reasonable cause to believe the employer had discriminated against a class of women who—like the charging party—had applied for mining jobs and been denied because the employer's hiring system was based exclusively on referrals from existing employees. *Mach Mining* JA at 15, 22-23, *available at* 2014 WL 4380915. The class of potential claimants on whose behalf the EEOC sued was therefore easily ascertainable—it consisted of every woman

who applied for and was denied a position while the alleged discriminatory practice was in effect.

Similarly, in *General Telephone*, the EEOC brought suit only after investigating and finding reasonable cause to believe that the employer used discriminatory maternity-leave policies and discriminated in its assignments of women to jobs and managerial positions. In allowing the EEOC to move forward with a class claim, the *General Telephone* Court stressed that although "EEOC enforcement actions are not limited to the claims presented by the charging parties," they are limited to those "violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint." 446 U.S. at 331. In other words, where the EEOC investigates and finds reasonable cause to believe the employer has engaged in a discriminatory practice affecting a class, the EEOC should attempt conciliation as to that practice and the identifiable class it affects and bring suit on behalf of the class if those conciliation attempts fail.

While the EEOC feigns surprise at this rule, it has been the settled law applied by this Court and the courts of appeals for decades. *See, e.g., EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668 (8th Cir. 1992); *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364-65 (4th Cir. 1976).[10] And there is good reason for such a rule. "'The relatedness of the initial

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[10] Each of the cases cited by the EEOC in note 15 of its Response Brief applies this same rule.

charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation.'" Pet. App. 110a.[11]

It is undisputed that the EEOC never identified the alleged discriminatory practices at issue in these 67 highly individualized cases during the course of its investigation, that it never made a reasonable-cause determination as to any common discriminatory practice, and that it never attempted to conciliate with CRST over any alleged common discriminatory practice. Nonetheless, after CRST challenged the basis for the EEOC's identification of hundreds of individual claims and the district court allowed the case to proceed based on the EEOC's representation that it had valid grounds for each of its claims, the EEOC required CRST to litigate 153 individual claims that were ultimately dismissed, including these 67 claims. But as this Court unanimously held in *Mach Mining*, before it can bring suit, the EEOC "must inform the employer about the specific allegation" against the employer by "describ[ing] both what the employer has done and

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[11] That one court of appeals judge adopted the EEOC's "class" argument cannot establish that the position was objectively reasonable or that the Eighth Circuit's contrary holding broke new ground. *See, e.g., Chaidez v. United States*, 133 S. Ct. 1103, 1110-11 & n.11 (2013) ("Dissents have been known to exaggerate the novelty of majority opinions; and 'the mere existence of a dissent' . . . does not establish that a rule" was not "'apparent to all reasonable jurists'").

which employees (or what class of employees) have suffered as a result." 135 S. Ct. at 1655-56. That requirement to "describe[] . . . *what* class of employees" is involved cannot possibly be met simply by asserting a completely undefined and unbounded "class of employees and prospective employees," JA 811a, as the EEOC did here.

The district court, which had overseen this case for years, thus acted well within its discretion when it found that the EEOC had unreasonably short-circuited the statutory process, to the manifest detriment of all involved, and that a fee award was therefore warranted under *Christiansburg*. Substantial deference is due to this determination. *Fox*, 131 S. Ct. at 2216.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR FORFEITURE REFORM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Americans for Forfeiture Reform[1] ("AFR") is a non-profit, non-partisan civic group concerned with the government's fearsome power to forfeit private property, which "can be devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). To this end, AFR is especially focused on the problem of civil forfeiture abuse. Civil forfeiture lets the government profit by seizing property allegedly linked to crime without ever having to prove the owner's guilt. This power thus raises the "serious risk that an innocent person will be deprived of his property." *United States v. $191,910*, 16 F.3d 1051, 1069 (9th Cir. 1994).

Given this reality, AFR works to increase public awareness of civil forfeiture abuse and the urgent need for legal reform. AFR advances this goal in a variety of ways, including the filing of *amicus curiae* briefs and helping property owners find effective legal counsel in civil forfeiture cases.[2]

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[1] This brief is filed based on Petitioner's blanket letter of consent (which is on file with the Court) and Respondent's written consent. No counsel for either party authored this brief in whole or in part; nor did any person or entity, other than AFR and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Petitioner, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015); Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Defendants-Appellants, *United States v. $28,000*, 802 F.3d 1100 (9th Cir. 2015) (No. 13-55266).

AFR is accordingly interested in the present case. This case requires the Court to answer a legal question that could affect the willingness of property owners to resist wrongful government civil forfeiture actions despite Congress's enactment of a fee-shifting law meant to enable such resistance.[3] That question, in short, is whether the court-ordered dismissal of a government suit for failure to comply with statutory preconditions to filing suit renders the defendant a "prevailing party" eligible to seek a fee award.

AFR believes the Court should answer this question with a resounding "yes." By doing so, the Court will clarify its fee-award jurisprudence in a manner that "permits meaningful judicial review and produces reasonably predictable results." *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1672 (2010). The Court will also vindicate the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 61 (1984); *see id.* at 61 n.13 (collecting cases).

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[3] *See* Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT. R. 87, 88–90 (2001).

SUMMARY OF THE ARGUMENT

In his 2015 Year-End Report the Chief Justice reminded all lawyers of their duty to avoid "antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship."[4] Yet, when it comes to government civil suits against private defendants, the government too often engages in just such brinksmanship. Consider the present case. The district court found that the "EEOC's failure to investigate the [Title VII] claims of . . . 67 allegedly aggrieved persons . . . foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit." Pet. App. 211a.

But so long as this kind of conduct enables the government to "pound an opponent into submission," the government has every incentive to engage in it. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992). Thus, to level the playing field, Congress has enacted a host of fee-shifting laws granting private defendants who prevail in court the ability to recover their attorney's fees from the government. These laws include 42 U.S.C. § 2000e-5(k), which holds the government liable for fees in Title VII suits, and 28 U.S.C. § 2465(b)(1)(A), which does the same in federal civil forfeiture actions.

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[4] Chief Justice Roberts, U.S. Supreme Court, *2015 Year-End Report on the Federal Judiciary* 11 (2015), http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

For these laws to serve their purpose, however, it must be recognized that private defendants do not need a merits judgment or a court-ordered consent decree in order to "prevail" against the government and qualify for a fee award. *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). Private defendants also serve to prevail when the court orders dismissal of the government's claims. *See Angel v. Bullington*, 330 U.S. 183, 190 (1947) ("The 'merits' of a claim are disposed of when it is refused enforcement.").

The Eighth Circuit failed to realize that here. It held that the district court's dismissal of sixty-seven government claims did not make Petitioner a "prevailing party" eligible to receive fees under § 2000e-5(k). *See* Pet. App. 23a–24a. The Eighth Circuit based this conclusion on the legal ground for the dismissal: the government's failure to satisfy Title VII's preconditions for filing suit. *See id.* The Eighth Circuit held that because this ground was "not . . . a ruling on the merits," Petitioner lacked any basis to claim prevailing-party status. *Id.*; *see Buckhannon*, 532 U.S. at 603–04 (a "prevailing party" is usually a litigant who has received "some relief on the merits").

What the Eighth Circuit's analysis did not take into account, however, is the effect of Federal Rule of Civil Procedure 41 on the "dismissal of actions." In particular, Rule 41(b) provides that for "involuntary dismissals"—like the dismissal here—"[u]nless the dismissal order states otherwise . . . **any dismissal not under this rule**—except one for lack of

jurisdiction, improper venue, or failure to join a party under Rule 19—**operates as an adjudication on the merits.**" This means the Eighth Circuit had to treat the district court's dismissal order in this case as a ruling "on the merits" given that this order: (1) did not "state otherwise"; and (2) did not concern "lack of jurisdiction, improper venue, or failure to join a party under Rule 19." *See* Pet. App. 202a–217a.

The Eighth Circuit should thus be reversed for failing to follow Rule 41. At the same time, the Court should observe that Rule 41 clarifies three further aspects of prevailing-party status for defendants. ***First***, court-ordered dismissals will often confer prevailing-party status on defendants. ***Second***, court-ordered dismissals for failure to meet statutory preconditions to filing suit are as much "on the merits" as dismissals for failure to establish a claim element. ***Third***, court-ordered dismissals "without prejudice" can still alter the parties' legal relationship in ways that make defendants into prevailing parties.

Taken together, these observations reconcile the Court's fee-shifting jurisprudence with the main goal of defendants in court: to avoid an adverse judgment and end the litigation. Defendants should be eligible for fee awards regardless of how they achieve this goal—be it through a merits judgment in their favor, a consent decree, or a court-ordered dismissal. The Court now has the chance to clarify this point of law

and, in the process, incentivize the government to litigate its suits in a far more level manner.

ARGUMENT

I. This case stands to affect fee awards far beyond the Title VII fee award at issue, including fee awards under the Civil Asset Forfeiture Reform Act ("CAFRA").

The Court has agreed to decide here whether the "dismissal of a Title VII case, based on the government's total failure to satisfy its pre-suit . . . obligations . . . can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k)." The Court should not assume, however, that its decision here will be applied by lower courts only in the context of fee-shifting under Title VII. To the contrary, practical experience proves that whatever decision the Court reaches here will have a ripple effect on how fee awards are decided under many other fee-shifting laws, no matter how far removed these other fee-shifting laws might be from this case.

That includes the fee-award provision enacted under the Civil Asset Forfeiture Reform Act of 2000, or CAFRA, 28 U.S.C. § 2465(b)(1)(A). Under this law: "[I]n any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for . . . reasonable attorney fees." Notice that the words "prevailing party" appear nowhere in this

provision. But that has not kept lower courts from holding that this provision is bound by this Court's definition of the term "prevailing party."

Consider the Ninth Circuit's decision in *United States v. $186,416*, for example. 642 F.3d 753, 755–57 (9th Cir. 2010). The panel ruled in this case that CAFRA fee awards must be paid in the same way as fee awards under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The panel reached this conclusion based on *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010), in which this Court found that EAJA's use of the term "prevailing party" meant that EAJA awards were not payable to counsel in the first instance. The panel reasoned this holding applied equally to CAFRA fee awards because "*Ratliff* counsels that in the absence of explicit instructions from Congress . . . direct payment to the attorney should not be presumed." 642 F.3d at 756. Yet, the same panel conceded that while "EAJA specifically assigns fee awards to 'the prevailing party' . . . CAFRA does not." *Id.*

Now consider how CAFRA fee awards have been impacted by this Court's analysis of prevailing-party status in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). "Several lower courts have cited *Buckhannon* for the operative definition of 'substantially prevails' as it is used in CAFRA." *United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 948 (N.D. Ohio 2009) (collecting cases). This is despite the fact that *Buckhannon*, by its own terms, only sought to establish that Congress's use of the

term "prevailing party" does not reach plaintiffs who obtain "a voluntary change in the defendant's conduct" but no judicial relief. 532 U.S. at 600.

Put another way, this Court did not consider in *Buckhannon* what the outcome would have been under a statutory grant of fee awards to litigants who "substantially prevail"—language "broaden[ing] the class that can receive fees." *United States v. $60,201*, 291 F. Supp. 2d 1126, 1130 (C.D. Cal. 2003); *cf. Pierce v. Underwood*, 487 U.S. 552, 565 (1988). But courts have still applied *Buckhannon* to limit CAFRA fees to just those forfeiture claimants who "w[in] in court." *United States v. Khan*, 497 F.3d 204, 209 n.7 (2d Cir. 2007); *see United States v. Minh Huynh*, 334 F. App'x 636, 639 (5th Cir. 2009).

Based on this history, the Court should expect that its decision here will impact fee shifting under Title VII and many other laws, including CAFRA. After all, to decide this case, the Court must again define what "prevailing party" means—specifically, whether a defendant "prevails" when a government lawsuit is dismissed for failure to satisfy statutory preconditions to filing suit. *See* Pet. App. 23a–24a. And lower courts will once again draw broad insights from how the Court rules. With this in mind, one of the most critical insights that the Court can impart through this case is that private defendants should not be forced to foot the bill for suits the government was not entitled to bring in the first place.

II. Fee awards to defendants are appropriate whenever a government suit is dismissed because the government failed to obey the law—be it Title VII or CAFRA.

It is axiomatic that "[t]he government, like its citizens, must follow the law." Pet. App. 215a. But at no time is that axiom more important than when the government seeks to deprive someone of their life, their liberty, or their property through the judicial system. Indeed, in contrast to private parties, the "[g]overnment . . . has a more unfettered hand over those [that] it either serves or investigates." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). It is consequently "incumbent upon public officials, high and petty, to maintain some appreciation for the extent of the burden that their actions may impose." *Id.*

One of the ways that Congress has tried to boost this appreciation—as well as protect the rights of all Americans—is by imposing strict rules on when and how the government may litigate in various sensitive legal contexts. In this regard, Title VII sets out strict rules that the Equal Employment Opportunity Commission (EEOC) must follow when litigating employment discrimination actions against private employers. *See* 42 U.S.C. §§ 2000e *et seq.* And CAFRA sets out strict rules that the Justice Department must follow when litigating civil forfeiture actions against private property. *See* 18 U.S.C. § 983.

Under Title VII's litigation rules, the EEOC owes certain administrative duties to employers in addressing charges of discrimination. These duties include: "a duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit." *EEOC v. Agro Distribution LLC*, 555 F.3d 462, 473 (5th Cir. 2009). As such, "[u]nlike the typical [private] litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 455, 368 (1977); *see also, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("Title VII . . . imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit.").

CAFRA's litigation rules are equally restrictive. When the government seizes property to forfeit it, the government must send notice to any party with an interest in the property. *See* 18 U.S.C. § 983(a)(1). Then, if anyone makes a valid claim to the property, the government must file a civil forfeiture action in court within 90 days of getting the claim—a deadline that can be extended only "for good cause shown [to a court] or upon agreement of the parties." *Id.* § 983(a)(3)(A). If the government does not file suit in 90 days or secure an extension, then the government must "release the property." *Id.* § 983(a)(3)(B).

In the end, when the government plays by the above rules (and others like them), it avoids forcing private parties to bear unfair burdens—for example,

an employer does not have to bear the cost of a Title VII suit due to conciliation[5]; or a person does not have to wait indefinitely to get their property back due to prompt judicial review.[6] The government also saves court time and upholds the rule of law. As this Court has noted, "strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Unfortunately, the government time and again refuses to play by the rules—at least, when it comes to Title VII and CAFRA. The present case illustrates the point for purposes of Title VII.[7] The EEOC sued

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[5] *See Mach Mining*, 135 S. Ct. at 1651 (explaining that the EEOC's duty to conciliate under Title VII is "a key component" of Title VII's statutory scheme because in "pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means" (internal alterations and quotation marks omitted)).

[6] *See United States v. 2007 Harley Davidson St. Glide Motorcycle*, 982 F. Supp. 2d 634, 640–41 (D. Md. 2013) ("In mandating [under CAFRA] that the United States file forfeiture complaints within the specified amount of time, Congress effectively determined that the interest in apprising claimants of the alleged basis of the forfeiture and expeditiously processing forfeiture complaints outweighed the loss of dismissing potentially meritorious claims for untimely filing.").

[7] *See also, e.g.*, *EEOC v. CVS Pharmacy, Inc.*, No. 14-3653, 2015 U.S. App. LEXIS 21963, at *1–2 (7th Cir. Dec. 17, 2015) (affirming dismissal where EEOC refused to conduct pre-suit conciliation); *EEOC v. OhioHealth Corp.*, No. 2:13-cv-780, 2015 U.S. Dist. LEXIS 84016, at *2 (S.D. Ohio June 29, 2015) ("[T]he EEOC has failed to engage in good faith conciliation . . . ."); *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 814 (S.D.N.Y.

(Continued on following page)

on behalf of sixty-seven allegedly aggrieved workers without following any of Title VII's litigation rules on pre-suit investigation and conciliation. *See* Pet. App. 204a–206a. This failure, in turn, "foreclosed any possibility that the parties might settle ... this dispute without the expense of a federal lawsuit" and instead forced Petitioner to incur over $4 million in attorney's fees. *Id.* at 211a; *see id.* at 74a–81a, 84a.

The above state-of-affairs led the district court here to cast the government's conduct as a "'sue first, ask questions later' litigation strategy." *Id.* at 214a. That description also fits how the government has litigated more than a few civil forfeiture cases in recent years.[8] In one such case, the government's complaint itself proved that the case was invalid. *See United States v. $80,891.25*, No. 4:11-cv-183, 2011 U.S. Dist. LEXIS 145500, at *2–3 (S.D. Ga. Dec. 19, 2011) ("According to the Government's complaint ... Davila-Tosado filed a claim on April 13, 2011 .... The Government had to file its complaint on or before July 12, 2011, ninety days after .... Instead, the Government filed ... on July 14, 2011.").

2013) ("The EEOC's conduct ... blatantly contravenes Title VII's emphasis on resolving disputes without ... litigation.").

[8] *See, e.g.*, *Harley Davidson*, 982 F. Supp. 2d at 641 ("[T]he United States has not shown good cause for its failure to file the Complaint within the time that § 983(a)(3)(A) [i.e., CAFRA] prescribes."); *United States v. Funds from Fifth Third Bank Account*, No. 13-11728, 2013 U.S. Dist. LEXIS 157447, at *25 (E.D. Mich. Nov. 4, 2013) ("[T]he Government failed to seek an extension before the 90-day period expired ....").

The government's sue-first strategy often comes with a further price tag for property owners and private employers who decide to defend themselves in court: months, if not years, of litigation over fruitless last-ditch efforts by the government to forestall defeat.[9] This may be seen here in the EEOC's failure to cite any "binding legal authority that allow[ed] it to do what it [was] attempting to do"—avoid its Title VII duty to conciliate. Pet. App. 206a. This may also be seen in *EEOC v. Freeman*, where the EEOC asserted "positions not grounded in law" to protect an EEOC expert witness with a "record of slipshod work, faulty analysis, and statistical sleight of hand." 778 F.3d 463, 471 (4th Cir. 2015) (Agee, J., concurring).

The government's obstinacy in civil forfeiture cases is even more staggering. In one recent case, the government pressed "specious litigation arguments" in support of its forfeiture claim. *United States v. $28,000*, 802 F.3d 1100, 1104 (9th Cir. 2015). In another case, the government raised a forfeiture claim through a motion "for summary judgment and supporting affidavits [that] contained material omissions." *United States v. $167,070*, No. 3:13-CV-00324, 2015 U.S. Dist. LEXIS 76473, at *43 (D. Nev. June

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[9] Of course, the government's last-ditch efforts also reflect a waste of government time and resources—not to mention its reputation. Such waste has recently led one judge to note in a Title VII case that "the nation's deep commitment to combatting discrimination will be affected for good or ill by the esteem in which this important agency [i.e., the EEOC] is held." *Propak*, 746 F.3d at 157 (Wilkinson, J., concurring).

12, 2015). And in a third notable case, the government "fail[ed] to disclose . . . [a] history of directly contrary rulings" to its legal position. *United States v. One 2003 Mercedes Benz CL500*, No. PWG-11-3571, 2013 U.S. Dist. LEXIS 143041, at *13 n.5 (D. Md. Oct. 1, 2013). The list goes on.[10]

This is where Title VII's and CAFRA's fee-award provisions come into play. Both of these provisions allow prevailing defendants to recover their fees and costs from the government. In particular, 42 U.S.C. § 2000e-5(k) allows the "prevailing party" in a Title VII action "a reasonable attorney's fee . . . as part of the costs" and establishes that the EEOC "and the United States shall be liable for costs the same as a private person." And under 28 U.S.C. § 2465(b)(1)(A), CAFRA provides that whenever a property owner "substantially prevails" in a civil forfeiture action, "the United States shall be liable for . . . reasonable attorney fees and other litigation costs reasonably incurred by the claimant." *See supra* Part I.

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[10] *See, e.g.*, *United States v. $220,030*, No. 11-cv-7779, 2013 U.S. Dist. LEXIS 20188, at *10 (N.D. Ill. Feb. 14, 2013) ("The Government . . . appears to misapprehend the rules governing this action."); *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504, 2012 U.S. Dist. LEXIS 47012, at *8–9 (E.D. Mo. Mar. 31, 2012) ("The Government cannot . . . initiate a civil forfeiture proceeding on the basis of one bold assertion . . . ."); *United States v. 2005 Toyota Sequoia*, No. CV 09-2012, 2010 U.S. Dist. LEXIS 116665, at *4–5 (D. Ariz. Oct. 25, 2010) ("[The Government] challenges Claimant's standing . . . . Despite ample case law on this issue, [the Government] inexplicably diverge[s] from the established Article III standing analysis.").

Congress enacted these statutes to ensure that the government could not "pound an opponent into submission"—especially through lawsuits that were premature or unwinnable. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992). Title VII's fee-award provision thus forces the EEOC to confront "the same potential penalties as private parties who bring vexatious litigation." *Propak*, 746 F.3d at 155 (Wilkinson, J., concurring).

The same goes for CAFRA's fee-award provision. Civil forfeitures are rarely fought because property owners often have little or no "money left after the seizure to fight the battle." H.R. Rep. No. 106-192 at 14 (1999). CAFRA fee awards level the playing field. District courts have thus granted CAFRA fee awards in cases where the government did not obey CAFRA's litigation rules. *See, e.g.*, *United States v. $80,891.25*, No. 4:11-cv-183, 2012 U.S. Dist. LEXIS 6196, at *1–7 (S.D. Ga. Jan. 19, 2012) (granting fees after dismissal of a time-barred civil forfeiture claim). In doing so, these courts have vindicated CAFRA's goal to make property owners "whole after wrongful government seizures." *$28,000*, 802 F.3d at 1107.

These kinds of awards, whether under CAFRA or Title VII, should continue—and this Court's fee-shifting jurisprudence supports that outcome. The Eighth Circuit held otherwise here only because of the wide confusion that currently exists among lower courts on how to reconcile court-ordered dismissals with this Court's definition of "prevailing party." The

Court should now make use of Federal Rule of Civil Procedure 41 to resolve that confusion.

III. This Court should apply Fed. R. Civ. P. 41 to clarify that a court-ordered dismissal can make a defendant (or a forfeiture claimant) into a "prevailing party."

This Court's review of the judgment in this case ultimately turns on one simple question: was Petitioner a "prevailing party?" *See* Pet. App. 23a–24a. Any answer to that question must begin and end with the Court's ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001).

In *Buckhannon*, the Court observed that many federal laws "allow courts to award attorney's fees and costs to the 'prevailing party.'" *Id.* at 600. The Court then established the following meaning for this term: to be a "prevailing party," a litigant must be the beneficiary of a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. And no reason exists to believe this definition applies less to defendants than it does to plaintiffs. *Cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

Yet, while plaintiffs and defendants are bound by the same definition of "prevailing party," this does not mean they must achieve prevailing-party status in the exact same way. Common sense teaches that plaintiffs and defendants have very different goals. Plaintiffs want to win relief through their suit. This

means that the ways that plaintiffs usually prevail are by "a judgment on the merits or a court-ordered consent decree." *Buckhannon*, 532 U.S. at 600.

Defendants, however, want something different: they want *to avoid* an adverse decision and end the litigation.[11] *See R.T. Nielson Co. v. Cook*, 40 P.3d 1119, 1126 (Utah 2002) ("[I]f [a] defendant . . . avoids adverse judgment, [the] defendant has prevailed."). Now defendants may achieve this through a merits judgment in their favor or through a consent decree. But defendants can also achieve this outcome in a third way: through a court-ordered dismissal.

The question then becomes when does a court-ordered dismissal satisfy the *Buckhannon* test for prevailing-party status? There can be no doubt that *court-ordered* dismissals by definition pass the first part of this test, for all such dismissals are "judicially sanctioned." But are all these dismissals equal in producing the kind of "change" in the parties' legal relationship that *Buckhannon* requires?

Fortunately, Federal Rule of Civil Procedure 41 provides a clear framework for answering this hard

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[11] In speaking about "defendants," Amicus includes property owners defending their property against judicial civil forfeiture actions filed by the government. Forfeiture claimants resemble regular civil defendants in several key respects, including the ability to prevail through dismissal. *See* Fed. R. Civ. P., Supp. R. G(8)(b)(i) ("A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).").

question.[12] Rule 41 governs the "dismissal of actions" and separates dismissals into two categories. Rule 41(a) covers "voluntary dismissals," which are dismissals imposed at the plaintiff's request. Rule 41(b) covers "involuntary dismissals," which are dismissals imposed against the plaintiff's will.

Viewing Rule 41 as a whole, however, it is clear this rule requires court ratification of a dismissal in two situations: (1) when the dismissal is involuntary; and (2) when a plaintiff seeks dismissal without the defendant's consent and after the defendant has filed an answer or a motion for summary judgment. The following review of both situations, in turn, reveals their capacity to "change" the legal relationship of the parties. Rule 41 consequently makes it clear that court-ordered dismissals will in many cases confer prevailing-party status on defendants.

A. Petitioner is a prevailing party here because the district court ordered an involuntary dismissal that Rule 41(b) classifies as "on the merits."

Rule 41(b) establishes a default standard for the legal effect of involuntary dismissals—i.e., dismissals imposed by the court against the plaintiff's will. Under this standard, all involuntary dismissals must be treated as "operat[ing] as an adjudication on the

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[12] Rule 41 is binding on all federal courts via the operation of the Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*

merits" unless the dismissal falls within one of two exceptions: (1) the dismissal "states otherwise"; or (2) the basis for the dismissal is "lack of jurisdiction, improper venue, or failure to join a party."

Thus, where a court involuntarily dismisses a plaintiff's claims and the court's dismissal order does not fall into the above exceptions, Rule 41(b) casts the dismissal order as a ruling "on the merits."[13] This makes sense given that "[t]he 'merits' of a claim are disposed of when it is refused enforcement." *Angel v. Bullington*, 330 U.S. 183, 190 (1947). So, when a dismissal falls under Rule 41(b), the defendant now enjoys "relief on the merits"—and that is a "judicially sanctioned change in the legal relationship of the parties" that makes the defendant into a prevailing party. *Buckhannon*, 532 U.S. at 605.[14]

Applying that reasoning here, Petitioner was entitled to claim prevailing-party status based on the district court's involuntary dismissal of sixty-seven EEOC claims. Rule 41(b) classifies the district court's

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[13] *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 637 n.1 (1962) (Black, J., dissenting) (where Rule 41(b) applies and "the order of dismissal . . . d[oes] not specify that it was without prejudice," then "the dismissal operates as a judgment on the merits").

[14] *See, e.g., Morris v. Kesselring*, 514 F. App'x 233, 236–37 (3d Cir. 2013) ("Because a dismissal pursuant to Rule 41(b) 'operates as an adjudication on the merits,' . . . [the defendants here] are prevailing parties.").

dismissal order as "an adjudication on the merits" because the order does not fall under any of the rule's exceptions to its on-the-merits presumption.

Rule 41(b)'s first exception establishes that an involuntary dismissal is a non-merits decision when the underlying dismissal order says so. The dismissal order here, however, "bar[red] the EEOC from seeking relief" on the sixty-seven claims at issue. Pet. App. 215a. That is a dismissal on the merits since "[t]he 'merits' of a claim are disposed of when it is refused enforcement." *Angel*, 330 U.S. at 190.

Rule 41(b)'s second exception establishes that involuntary dismissals for "lack of jurisdiction, improper venue, or failure to join a party" are non-merits decisions. The dismissal order here, however, rested on the EEOC's failure to meet its Title VII pre-suit duties—a ground held by the Eighth Circuit to be "nonjurisdictional." Pet. App. 22a. And while this conclusion led the Eighth Circuit to deem the dismissal order to be a non-merits decision for purposes of prevailing-party analysis, the Eighth Circuit's earlier affirmance of the same dismissal order still stands. *See* Pet. App. 115a-116a.

Hence, under the plain terms of Rule 41(b), the district court's dismissal order must be deemed an "adjudication on the merits," and the Eighth Circuit erred in holding otherwise (and in denying Petitioner

prevailing-party status as a result).[15] *See* Pet. App. 23a-24a. That makes this case very simple for the Court to resolve. Moreover, while the parties did not point out this solution in their respective certiorari-stage briefing, the Court nevertheless "retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

Application of Rule 41(b) to this case would also give this Court a chance to prevent confusion among the lower courts on two related points of law:

Point #1: Since Rule 41(b) lets district courts remove involuntary dismissal orders from the rule's on-the-merits presumption by "stat[ing] otherwise," this raises the question of whether that should have happened here. Put another way, should the district court have classified its dismissal as a non-merits ruling because it was based on plaintiff's failure to comply with statutory preconditions to filing suit? The answer is "no," because these preconditions bear as much on the sufficiency of a plaintiff's claims as the elements of these claims themselves.

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[15] *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) ("[T]he Federal Rules of Civil Procedure are as binding as any statute . . . and federal courts have no more discretion to disregard the Rules' mandate than they do to disregard constitutional or statutory provisions." (internal alterations and quotation marks omitted)).

This answer ultimately rests on the legal status of non-jurisdictional preconditions to filing suit. In short, these preconditions are affirmative defenses that generally fall into one of two categories. First, there are filing deadlines that operate like statutes of limitation. *See* Fed. R. Civ. P. 8(b). Second, there are procedural duties, like CAFRA's duty to give notice or Title VII's duty to conciliate. Courts have seen fit to describe these duties as "administrative remedies" that plaintiffs must exhaust before filing suit.[16] *See Jones v. Bock*, 127 S. Ct. 910, 919 (2010) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.").

This means that Plaintiffs do not have to allege in their complaints that all preconditions to filing suit have been met.[17] Defendants can also waive these preconditions.[18] But these preconditions, like any other affirmative defense, also go to the merits of a claim because the Federal Rules only allow for the pleading and enforcement of claims "*showing that the pleader is entitled to relief.*" Fed. R. Civ. P. 8(a)(2). It is for this reason that defendants may demand the

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[16] *EEOC v. Dots, LLC*, No. 2:10-cv-319, 2010 U.S. Dist. LEXIS 129064, at *9 (N.D. Ind. Dec. 6, 2010).

[17] *See, e.g. Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006) ("[A] complaint need not anticipate or overcome affirmative defenses . . . .").

[18] *See, e.g., Janowiak v. Corp. City of South Bend*, 576 F. Supp. 1461, 1465 (N.D. Ind. 1983) ("Affirmative defenses can be waived or equitably tolled.").

dismissal of a claim not only because the plaintiff has failed to plead a claim element (e.g., actual loss) but also because the claim is not one "*upon which relief can be granted*." Fed. R. Civ. P. 12(b)(6).[19]

To put this in concrete terms, a plaintiff may plausibly allege every element of a Title VII claim (e.g., membership in a protected group, etc.) that she had 50 years ago. The defendant may then assert that the claim is indisputably time-barred. Dismissal of the plaintiff's Title VII claim on the merits is then proper because no court can enforce a time-barred claim.[20] The district court here thus correctly determined that its "dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations [was] a dismissal on the merits." Pet. App. 59a.[21]

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[19] *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("[D]ismissal for failure to state a claim under . . . [Rule] 12(b)(6) is a 'judgment on the merits.'").

[20] *See Jones*, 127 S. Ct. at 920–21 ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim . . . .").

[21] Under the Rule 41 analysis given here, prevailing-party status only attaches to *complete* dismissals. Indeed, a dismissal must pass into judgment before a fee motion may be filed. *See* Fed. R. Civ. P. 54(d). Prevailing-party status therefore would not attach to dismissals that grant plaintiffs leave to amend. *Cf. Hanrahan v. Hampton*, 446 U.S. 754, 759 (1980) (mere appellate reversal of a directed verdict could not confer prevailing-party

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Point #2: In applying Rule 41 to this case, the Court should distinguish *Costello v. United States*, 365 U.S. 265, 284–88 (1961). In *Costello*, this Court held that Rule 41(b)'s exemption of jurisdictional dismissals from its scope covered dismissals "based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." *Id.* at 285.

At first blush, this statement might be taken to mean that Rule 41(b)'s exemption of jurisdictional dismissals covers all dismissals based on statutory preconditions to filing suit, including Title VII's pre-suit duties. But the facts of *Costello* clarify that this statement only refers to preconditions that are *truly jurisdictional* in nature—preconditions that divest a court's power to hear a case as opposed to merely impairing a plaintiff's entitlement to relief.

Indeed, in *Costello*, the Court attributed power-stripping impact to a federal law that required the government to file an affidavit as part of initiating a denaturalization proceeding.[22] *See id.* at 287. As the Court observed, "failure of the Government to file the

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status upon plaintiffs: it was still an open question as to whether plaintiffs would win at trial).

[22] It seems unlikely that the Court would rule the same today. "In recent years, [the Court] ha[s] repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (alterations, brackets, and quotation marks in original omitted).

affidavit with the complaint requires the dismissal of the proceeding." *Id.* The same cannot be said of the Title VII pre-suit duties at issue here.

To the contrary, as this Court has recently held, when the EEOC files suit before meeting its Title VII duty to conciliate, the EEOC's suit should be stayed to allow for conciliation. *See Mach Mining*, 135 S. Ct. at 1653. If Title VII's preconditions to filing suit were jurisdictional, however, then case dismissal would be required. *See* Fed. R. Civ. P. 12(h)(3). Rule 41(b) thus continues to apply with full force to the dismissal at issue here, and the Court should clarify that *Costello* does not contradict that reality.

B. Defendants can also prevail when a court orders voluntary dismissal.

While this case hinges on the Eighth Circuit's refusal to find that Petitioner was a prevailing party under the district court's sixty-seven-claim dismissal order, there is one more dismissal at play that merits the Court's attention. The Eighth Circuit held in a footnote that Petitioner was not a prevailing party "as to Jones's claim, which the EEOC voluntarily dismissed"—subject to the legal requirements of Rule 41(a)(2)[23]—because of the agency's "failure to satisfy its presuit obligations." Pet. App. 24a n.4.

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[23] The district court's fee opinion indicates that the EEOC voluntarily dismissed Jones's claim by filing a "Notice of Withdrawal of Claim for Tillie Jones." *See* Pet. App. 59a. The EEOC's

(Continued on following page)

This footnote is troubling because it exposes the problem with any attempt to resolve this case on the narrow ground that Petitioner only prevailed on the sixty-seven claims that were involuntarily dismissed by the district court. In short, such a holding would send the following message to the government: litigate inherently defective cases to the very brink of defeat, and then voluntarily dismiss those cases whenever defeat—and a fee award—is imminent.

Such brinksmanship can be prevented. The Court should clarify that defendants may also prevail when a court orders a voluntary dismissal without prejudice under Rule 41(a)(2).[24] The need for such clarification is pressing given the persistent contrary view held in error by many lower courts. *See, e.g.*, *United States v. Ito*, 472 F. App'x 841, 842 (9th Cir. 2012) ("[D]ismissal without prejudice precludes prevailing party status."); *Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037–38 (8th Cir. 2001) ("[A]

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notice could not effect a dismissal of Jones's claim, however, unless the notice followed the requirements of Rule 41(a)(2). That rule dictates that once an answer has been filed, any plaintiff-requested voluntary dismissal is allowed "only by court order, on terms that the court considers proper."

[24] The Court's grant of certiorari here fully empowers the Court to review all parts of the decision and judgment below. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 567–68 (1931) ("The entire record . . . is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court.").

voluntary dismissal without prejudice means that neither party can be said to have prevailed.").

A recent example of this error may be seen in *United States v. $32,820.56*, No. C13-4102, 2015 U.S. Dist. LEXIS 67528 (N.D. Iowa May 22, 2015). In this forfeiture case, the court empathized with the target of the forfeiture, Carole Hinders, "a 67 year-old woman on the doorstep of retirement."[25] *See id.* at *10–11. The court noted that "[a]fter seizing [Hinders'] money and causing [her] to incur substantial expenses over a long period of time to fight that seizure, the Government elected to drop the case, effectively saying 'never mind.' The return of the seized funds hardly makes [Hinders'] whole." *Id.* at 11.

Nevertheless, the same court ruled that it could not entertain Hinders' request for a CAFRA fee award because the Rule 41(a)(2) voluntary dismissal that the court granted to the government—over Hinders' objection—was "without prejudice." *Id.* As the court explained, "dismissal without prejudice lacks the required judicial imprimatur to qualify as a material alteration of the parties' legal relationship." *Id.* at *10–11. The most the court felt it could do was order the government to pay Hinders' costs. *See id.* at *17–20. Troubled by this result, the court included in its analysis the following plea: "Perhaps Congress or a higher court will find it appropriate to allow relief

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[25] Appellant's Brief at 1, *United States v. $32,820.56*, Nos. 15-2622, 15-2624, 2015 WL 5544838 (8th Cir. Sept. 17, 2015).

under these circumstances. This court, however, lacks the authority to do so." *Id.* at *11.

As it turns out, however, the court in *$32,820.56* did have the authority under *Buckhannon* to find that Ms. Hinders was a prevailing party. The same goes for the district court here in finding Petitioner prevailed on Jones's claim. *See* Pet. App. 59a-60a. What has prevented courts from recognizing this is the persistent myth that "dismissal with prejudice" is the only way a court-ordered voluntary dismissal can alter the parties' legal relationship. Not so.

Indeed, one of the most well-established ways that a voluntary dismissal under Rule 41(a)(2) can change the parties' legal relationship—even when the dismissal is "without prejudice"—is by forcing a plaintiff to pay the defendant's costs. To understand the history supporting this observation, however, it is necessary to consider how Rule 41(a) works.

From its inception, Rule 41(a)(1) has allowed a plaintiff to "dismiss an action without a court order" by filing either: (1) "a notice of dismissal" before the defendant has served "an answer or a motion for summary judgment"; or (2) "a stipulation of dismissal signed by all the parties who have appeared." Any Rule 41(a)(1) dismissal will then be treated as being "without prejudice" unless the notice or stipulation of dismissal says otherwise. This Court has thus noted that: "Rule 41(a)(1) preserves th[e] unqualified right of the plaintiff to a dismissal without prejudice prior

to the filing of [a] defendant's answer."[26] *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212, 217 (1947).

Now, once a defendant has served an answer, the only way that plaintiffs can dismiss their case—absent a stipulation with the defendant—is through Rule 41(a)(2). This rule provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." The rule further presumes that a 41(a)(2) dismissal is "without prejudice" unless the dismissal order "states otherwise." Taken together, these provisions are "framed so as to prevent the voluntary dismissal of an action on the mere whim of the plaintiff after answer is served." *Welter v. E. I. Du Pont de Nemours & Co.*, 1 F.R.D. 551, 553 (D. Minn. 1941).

In the wake of Rule 41's adoption, many courts recognized the vital importance of this goal and thus debated how to give full weight to Rule 41(a)(2)'s requirement that voluntary dismissals be granted

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[26] This is ultimately why a Rule 41(a)(1) dismissal generally cannot trigger prevailing-party status: the court has no role in enabling this form of dismissal as the notice of dismissal is self-executing. This is arguably also true of 41(a)(1) dismissals when plaintiffs—or the parties by stipulation—agree to a dismissal "with prejudice," as such dismissals are just private agreements between the parties with no judicial imprimatur. *See Samsung Elecs. Co., Ltd. v. Rambus Inc.*, 440 F. Supp. 2d 495, 509 (E.D. Va. 2006). *But see BWP Media USA, Inc. v. Gossip Cop Media, LLC*, No. 13 Civ. 7574, 2015 U.S. Dist. LEXIS 8804, at *11–12 (S.D.N.Y. Jan. 26, 2015) (holding that a Rule 41(a)(1) dismissal with prejudice can give rise to prevailing-party status).

only "upon such terms and conditions as the court deems proper."[27] A leading authority soon emerged: *McCann v. Bentley Stores Corp.*, 34 F. Supp. 234, 234 (W.D. Mo. 1940).[28] In *McCann*, Judge Otis noted that before Rule 41, federal courts had faced the following reality: a case would go to trial, the defendant would present his case "at great expense," and then "the plaintiff would dismiss, just at the moment the court was about to direct a verdict for defendant." *Id.*

What made this legal maneuvering particularly "outrageous," Judge Otis explained, was that the plaintiff's "dismissal was without prejudice," which meant "the defendant ha[d] been put to expense literally for nothing." *Id.* Rule 41(a)(2), however, "put an end to that evil" by dictating that such dismissals could now be granted by the court only on "terms and conditions as the court deem[ed] proper." *Id.* at 234–35. This led Judge Otis to conclude that "no 'terms and conditions' are conceivable except such as are

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[27] *McCann*, 34 F. Supp. at 234 (quoting the language of Rule 41(a)(2) in 1940). The present text of Rule 41 states the same requirement, allowing voluntary dismissal under 41(a)(2) "only by court order, on terms that the court considers proper."

[28] *See, e.g.*, *Hannah v. Lowden*, 3 F.R.D. 52, 53 (D. Okla. 1943) (following *McCann*); *Gold v. Geo. T. Moore Sons*, 3 F.R.D. 201, 202 (S.D.N.Y. 1943) (same); *Mott v. Conn. Gen. Life Ins. Co.*, 2 F.R.D. 523, 526 (N.D. Iowa 1942) (same); *Taylor v. Swift & Co.*, 2 F.R.D. 424, 424 (S.D. Fla. 1942) (same); *Hamilton Watch Co. v. Hamilton Chain Co.*, 43 F. Supp. 85, 93 (D.R.I. 1942) (same); *Welter v. E. I. Du Pont de Nemours & Co.*, 1 F.R.D. 551, 554 (D. Minn. 1941) (same).

calculated to compensate the defendant for the expense to which he has been put." *Id.*

To this end, many other federal courts have ruled that a necessary term-and-condition of any Rule 41(a)(2) dismissal is that the plaintiff be required to pay the defendant's costs.[29] As the Eighth Circuit has explained, "[t]he rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs."[30] *Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317, 319 (1943) (district court "abused its discretion" in permitting voluntary dismissal without prejudice "unless conditioned on payment of costs").

Federal courts have thus long understood Rule 41(a)(2)'s terms-and-conditions requirement to be a "protection of the rights of the defendant." *Id.* at 318. This has led many courts to order plaintiffs to pay not only costs but also fees. *See Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985) ("Fee awards are often made when a plaintiff dismisses a suit without prejudice under Rule 41(a)(2)."). These orders reveal in

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[29] *See, e.g., De Filippis v. Chrysler Sales Corp.*, 116 F.2d 375, 377 (2d Cir. 1940) (affirming cost award to defendant under Rule 41(a)(2)); *Lawson v. Moore*, 29 F. Supp. 175, 176 (W.D. Va. 1939) ("Plaintiff's motion to dismiss without prejudice is . . . granted, but the plaintiff must pay the costs in this action."); *see also supra* note 28 and the cases cited therein.

[30] *See also Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924) (finding it "clear from an examination of the authorities, English and American" that plaintiffs were generally entitled to "dismiss[al] . . . without prejudice, on payment of costs").

turn that "voluntary dismissal under Rule 41(a)(2) bears considerable similarity to a consent decree." *Samsung Elecs. Co., Ltd. v. Rambus Inc.*, 440 F. Supp. 2d 495, 509 (E.D. Va. 2006). This is because "[u]nlike a stipulated dismissal, to which the parties have an absolute right, a Rule 41(a)(2) dismissal is committed to the discretion of the district court. In exercising that discretion, district courts can impose terms and conditions on the plaintiff in order to obviate any prejudice to the defendant."[31] *Id.*

Hence, when a court exercises its discretion under Rule 41(a)(2) and conditions the dismissal of an action without prejudice on payment of costs, the court renders the defendant a prevailing party. The court does this by "forcing . . . [the plaintiff] to pay an amount of money" to the defendant that the plaintiff "otherwise would not pay." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). And that is all the prevailing-party test demands. *See id.* at 114 (prevailing-party test does not turn on "magnitude of relief").[32]

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[31] Besides payment of costs and fees, other possible terms-and-conditions that a court may decide to impose on a voluntary dismissal without prejudice are: "restricting the forum in which the plaintiff may refile the claim"; "requir[ing] the plaintiff to (or not to) use existing discovery in any refiled action"; and "requir[ing] the plaintiff to produce additional discovery." *Samsung Elecs.*, 440 F. Supp. 2d at 509.

[32] This possibility has occurred to at least one other court. *See United States v. Cathcart*, 291 F. App'x 360, 364 (2d Cir. 2008) (speculating whether an "award of costs or fees as part of

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The Court should therefore discourage the myth that voluntary dismissals must be "with prejudice" in order to trigger prevailing-party status. By doing so, the Court will help ensure that voluntary dismissals are not used as get-out-of-court-free cards, while also enabling potentially meritorious claims to be kept alive.[33] The Court will also make fee-shifting review more objective by eliminating the need for courts to speculate about a plaintiff's true motives in seeking a voluntary dismissal. *See, e.g.*, *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). Instead, courts can consult the terms and conditions of their Rule 41(a)(2) orders, which should already reflect both the equities and the legal effect of the dismissal at hand.

C. Finding prevailing-party status just opens the door to a fee award.

Rule 41 clarifies that defendants are eligible to be treated as prevailing parties even if they do not possess a merits judgment or a court-ordered consent decree—a court-ordered dismissal will also dó. At the same time, attorney's fees are almost never awarded to prevailing parties automatically or as a matter of

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the 'terms' of a Rule 41(a)(2) dismissal" gives rise to prevailing-party status "within the meaning of *Buckhannon*").

[33] This is why the default status of dismissals under Rule 41(a)(2) is "without prejudice." The rule presumes that most 41(a)(2) dismissals will involve cases where "the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." *Cone*, 330 U.S. at 217 n.5.

course. Prevailing-party status is rather "step one" in a "three-step framework" by which any litigant may be awarded fees. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2154 (2010).

Step two requires a prevailing party to show they meet all the other conditions that an applicable fee-shifting law places on recovery. *See id.* Then, *step three* requires the court to calculate a reasonable fee award, which entails more limits on recovery. *See id.; see also Perdue*, 130 S. Ct. at 1669. What all of this ultimately means is that while Rule 41 allows more defendants to meet step one than the Eighth Circuit recognized here, step two will nonetheless remain a significant obstacle for many defendants.[34]

For instance, "a prevailing defendant in a Title VII case" cannot receive a Title VII fee award unless that defendant can also show "the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). And many fee-shifting laws further let courts deny fee awards as a matter of discretion even when all key statutory factors are met. *See, e.g.*, 42 U.S.C. § 1988(b) ("[T]he court, *in its discretion*, may allow . . . a reasonable attorney's fee . . . ." (emphasis added)); 42 U.S.C. § 2000e-5(k) (same).

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[34] CAFRA's fee-award provision is an exception. It *mandates* fee awards to those property owners who "substantially prevail" against the government and contains no other limitation. *See* 28 U.S.C. § 2465(b)(1)(A) ("[T]he United States *shall* be liable for . . . reasonable attorney fees . . . ." (emphasis added)).

As such, there is no policy concern that precludes application of Rule 41 in the manner prescribed above. Nor does the American Rule pose any bar—litigants must still point to a statute or contract that allows them a fee award before they can seek one. The preceding analysis just enforces Rule 41's clear mandate on how dismissals work, in accord with this Court's routine observation that "courts should generally not depart from . . . usual practice under the Federal Rules." *Jones*, 127 S. Ct. at 919.

CONCLUSION

Rule 1 of the Federal Rules of Civil Procedure was recently amended by "a mere eight words" to make a simple point: that judges and lawyers must "work cooperatively in controlling the expense and time demands of litigation."[35] To this end, the new Rule 1 establishes that the Federal Rules of Civil Procedure "should be construed, administered, and employed *by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." (emphasis added)

The Court now has an opportunity to put that principle to work. Rule 41 clarifies when a defendant is a "prevailing party" in the wake of a court-ordered dismissal. The Court should use this framework to

[35] Chief Justice Roberts, *supra* note 4, at 6.

achieve a "just, speedy, and inexpensive" resolution of this case. By doing so, the Court will ultimately ensure that when the government sues its citizens, the government has every incentive to "search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."[36]

Respectfully submitted,

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[36] *Id.* at 11.

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In the
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

PETITIONER,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR BASS PRO SHOPS OUTDOOR WORLD, LLC AND TRACKER MARINE RETAIL, LLC AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

For years, amici curiae Bass Pro Shops Outdoor World, LLC and Tracker Marine Retail, LLC (collectively, "Bass Pro") have been embroiled in onerous litigation brought by the Equal Employment Opportunity Commission ("EEOC"). *See EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425 (S.D. Tex.), No. 15-20078 (5th Cir.). The EEOC has sued Bass Pro for compensatory and punitive damages on behalf of tens of thousands of unidentified people. Although it did not investigate or identify a single individual the EEOC believes to have been the victim of actual discrimination, the EEOC nevertheless asserted that intentional discrimination in hiring was so pervasive at Bass Pro as to constitute a nationwide standard operating procedure, and demanded $30 million to settle the case. As it did with petitioner, the EEOC "wholly abandoned its statutory duties" to investigate, determine cause, and conciliate before bringing highly individualized § 706 claims against Bass Pro. Pet. App. 204a. Thus, the question presented in this case is of particular interest to Bass Pro, which respectfully submits this amicus brief in support of petitioner.

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[1] Petitioner's letter giving blanket consent to amicus briefs, and respondent's written consent to this brief, are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Dismissal based on the pre-suit obligations of Title VII should not *insulate* the EEOC from liability for attorneys' fees; instead, it strongly suggests that such an award is appropriate. Even without Congress's express direction, it is only a matter of common sense that the EEOC should investigate claims, determine whether there is at least reasonable cause to bring them, and attempt to conciliate them before bringing expensive, time-consuming litigation. Shooting first and asking questions later is, quite simply, not an acceptable approach to enforcing the law.

As exemplified by Bass Pro's ongoing case, however, the EEOC has a troubling record of noncompliance with the statutorily mandated prerequisites to filing a lawsuit. *See* Part I, *infra*. The EEOC also has an established track record of pursuing abusive litigation, without first assessing reasonable cause, in hopes of extorting settlements. *See* Part II, *infra*. As petitioner's brief explains, the statutory standard for fees, and the policy concerns animating that statute, are fully satisfied in such circumstances. When the EEOC's claims are dismissed for failure to investigate, determine reasonable cause, or otherwise satisfy the statutory prerequisites to bringing suit, the defendant has unquestionably "prevail[ed]," 42 U.S.C. § 2000e-5(k), and has done so precisely because the EEOC's claims are "frivolous, unreasonable, or groundless," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). District courts' authority to award fees in this regrettably common circumstance is necessary to

deter abuse by holding the agency accountable for ignoring "the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

ARGUMENT

I. The EEOC Did Not Meet Title VII's Pre-Suit Obligations Before Bringing § 706 Claims Against Bass Pro.

The Court once observed, in another case involving the EEOC, that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). As petitioner's case shows, however, the EEOC does not always follow the "integrated, multistep enforcement procedure" that Congress decreed in Title VII. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). According to the district court, "the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." Pet. App. 204a.

Bass Pro can report, based on its own experience, that petitioner is not alone in having been forced to defend claims that the EEOC never investigated, let alone conciliated, prior to suit. Bass Pro's encounter began with the issuance of two charges by an EEOC Commissioner. *See* 42 U.S.C. § 2000e-5(b) (providing

for "a charge . . . filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission"). Neither charge identified any aggrieved individuals, broadly defined in those documents as "all employees who have been, continue to be, or will in the future be adversely affected by the unlawful employment practices set forth in the foregoing charge." Instead, they vaguely alleged that Bass Pro engaged in a nationwide pattern or practice of discrimination against Black, Hispanic, Asian, and female applicants and employees.

During the "investigation" that followed, the EEOC did not identify a single individual it believed to be a victim of hiring discrimination. As the district court would later find, "no individuals were identified or investigated in the investigation period." *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, 2014 WL 6453606, at *4–*5 (S.D. Tex. Nov. 17, 2014). According to its attorney, the EEOC confined itself to a "statistical analysis" and did not investigate "specific people" or their "individual circumstances." *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, Hr'g Tr. at 40:13–41:1 (S.D. Tex. Nov. 19, 2013); *see also id.* at 55:8–56:2 (complaining that finding aggrieved individuals is "a very lengthy and expensive process, which is why we don't do it beforehand"). Rather, the EEOC simply compared Bass Pro's hiring data with census availability data and hiring data for alleged competitors' stores (which the EEOC refused to identify). *Id.* at 42:15–43:12.

A District Director of the EEOC eventually issued a determination of reasonable cause, which is

supposed to "inform the employer about the specific allegation" against it. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1655 (2015). The determination did not disclose the statistical methodology upon which the finding of reasonable cause was based, name a single aggrieved individual, or describe any allegedly discriminatory employment decision.

During the ensuing conciliation, the EEOC made a settlement demand of $30 million in compensatory and punitive damages (which are not available for pattern-or-practice claims according to 42 U.S.C. § 1981a(a)(1)) for 1000 unidentified individuals. In an effort to assess this eight-figure demand, Bass Pro repeatedly requested specific information about the EEOC's statistics and the underlying Title VII claims, only to be rebuffed each time. The EEOC declined to give information about any aggrieved individuals, such as their names or putative stories of discrimination.[2] In hindsight, such stonewalling is hardly surprising: The EEOC simply had no individualized information to share. As the EEOC's attorney declared, in an effort to justify to the district court why the agency had not shared any names with Bass Pro, "it's not that we were trying to hide

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[2] At one point, the EEOC did provide the names of two managers at a single store in Louisiana who were accused of making racist remarks. Bass Pro promptly investigated and terminated both of them. Thereafter, the EEOC refused to name any managers accused of discrimination. *Cf. EEOC v. Shell Oil Co.*, 466 U.S. 54, 92 (1984) (O'Connor, J., dissenting) (noting that EEOC "stonewalling" does not promote "voluntary remedial action").

information from the defendants. We don't have that information either." *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, Hr'g Tr. at 56:16–18 (S.D. Tex. Nov. 19, 2013).

Bereft of the information needed to assess the Title VII claims, Bass Pro was unable to engage in meaningful conciliation and the EEOC declared conciliation a failure. Ten months later, the EEOC sued Bass Pro. *See EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425 (S.D. Tex.).

The EEOC sought compensatory and punitive damages, pursuant to § 706 of Title VII, 42 U.S.C. § 2000e-5, potentially on behalf of every Black or Hispanic applicant who unsuccessfully applied to any of Bass Pro's 69 stores since 2005, without regard to whether they were eligible to be hired. By the EEOC's own estimation, there are 50,000 or more people who fit those criteria among over 1,000,000 unsuccessful applicants. The EEOC further sought an injunction against Bass Pro's alleged "pattern or practice" of discrimination under § 707 of Title VII, 42 U.S.C. § 2000e-6.[3]

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[3] Because compensatory and punitive damages are not available for a § 707 claim, as they are for a § 706 claim, *see* 42 U.S.C. § 1981a(a)(1), the EEOC has tried to bring a nonexistent pattern-or-practice claim pursuant to § 706. Bass Pro is challenging that move in an interlocutory appeal to the Fifth Circuit. *Cf.* JA 383a (noting district court's finding that "the EEOC is attempting to have its cake and eat it too" by "avail[ing] itself of the *Teamsters* burden-shifting framework yet still seek[ing] compensatory damages under § 706" (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977))).

The district court granted Bass Pro's motion to dismiss, albeit with leave to amend the complaint. *See EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 509 (S.D. Tex. 2012). The EEOC was held not to have plausibly alleged a nationwide pattern or practice of discrimination in support of its § 707 claim. *See id.* at 513–18. In addition, the district court concluded that the EEOC must name aggrieved individuals in support of the § 706 claims for compensatory and punitive damages: "While the EEOC is not obligated to provide the identities of all § 706 class members, the Court cannot locate a case in which the EEOC brought a § 706 claim without identifying a single plaintiff." *Id.* at 520–21.

The EEOC subsequently amended its complaint to provide, for the first time in half a decade of dealing with Bass Pro, the names of roughly 200 individuals with potential § 706 claims. The list included individuals who could not have been victims of discrimination and whose claims clearly were not investigated by the EEOC because they were actually hired, failed to appear for a required drug test, were not old enough to work, or were not eligible to work in a store selling firearms under ATF regulations. The failure to name these individuals during conciliation foreclosed informal resolution of their flawed claims—and confirmed glaring deficiencies in the EEOC's pre-suit efforts. *See EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 666 (S.D. Tex. 2014) ("[T]he EEOC ought to have provided more information. For instance, had Bass Pro had a better sense of how the class was comprised, it could have helped to weed out claimants who had in fact been hired . . . .").

Because the EEOC stonewalled Bass Pro prior to filing suit, the district court stayed the case in 2014 to allow for renewed conciliation. *See Bass Pro*, 1 F. Supp. 3d at 667–71. "Without information on the individual claims for which [the EEOC] sought compensatory damages—or at least *some* of those claims—Bass Pro was not afforded enough notice to meaningfully participate in the conciliation process." *Id.* at 666 (internal quotation marks omitted). The renewed conciliation failed, with the EEOC refusing to provide information regarding thousands of supposedly aggrieved individuals who were said to be entitled to compensatory and punitive damages under § 706, but who were not named in the amended complaint.

Litigation has continued in the wake of the failure of renewed conciliation, with the Fifth Circuit recently hearing Bass Pro's interlocutory appeal under 28 U.S.C. § 1292(b). *See EEOC v. Bass Pro Outdoor World, LLC*, No. 15-20078 (5th Cir.). The EEOC attempted to avoid that discretionary appeal based on "the overwhelming likelihood, the virtual certainty" that Bass Pro would settle. *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, Hr'g Tr. at 36:19–37:21 (S.D. Tex. Oct. 27, 2014). The district court rejected the EEOC's "deeply unfair" argument, comparing it to the " 'judicial blackmail' " that courts have condemned. *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, 2014 WL 6453606, at *4 (S.D. Tex. Nov. 17, 2014) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996)); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (Posner, J.) ("Judge Friendly, who was not given to hyperbole, called settlements induced by

a small probability of an immense judgment in a class action 'blackmail settlements.' ").[4]

In sum, the EEOC has forced Bass Pro to spend millions of dollars in attorneys' fees to defend itself against the § 706 claims of individuals who remain unknown to this day. Contrary to Title VII, the EEOC sued Bass Pro for compensatory and punitive damages without investigating the claims of even a single individual, without making a determination of reasonable cause as to any of their individualized claims, and without providing the information needed for meaningful conciliation. When the district court eventually forced the EEOC to identify individuals, it identified many who clearly lacked claims. The agency thus ignored Congress's attempt to "prevent the EEOC from imposing unjustified costs and disruption on an employer" by statutorily "limit[ing] the EEOC's litigation authority to investigated claims with potential merit, and then further to those that cannot readily be settled on terms acceptable to the EEOC." Pet'r Br. 38, 51.

II. EEOC Misconduct Is Alarmingly Common.

Bass Pro is not the only employer for whom petitioner's case will inspire déjà vu. The EEOC has a bad habit of flouting its pre-suit obligations under

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[4] Before the Fifth Circuit, Bass Pro is challenging the district court's refusal to "dismiss the § 706 claims for failure to investigate[ ] because the Court is not fully persuaded that the Commission is barred from bringing § 706 claims on behalf of unidentified victims." *EEOC v. Bass Pro Outdoor World, LLC*, 35 F Supp. 3d 836, 865 (S.D. Tex. 2014).

Title VII. If the EEOC is not susceptible to payment of attorneys' fees under 42 U.S.C. § 2000e-5(k) in cases like petitioner's and Bass Pro's, then it will have little incentive to do better.

Even when the EEOC does purport to have investigated actual victims of discrimination, its list of allegedly aggrieved persons has a tendency to fluctuate wildly. *See, e.g.*, *EEOC v. Global Horizons, Inc.*, 100 F. Supp. 3d 1077, 1090 (E.D. Wash. 2015) ("[The EEOC's] unpreparedness is highlighted by the ever-changing number of Thai claimants throughout this lawsuit."). In one case, the EEOC told a district court that it had 2000 people in its class, only to drop that number to 332 upon being ordered to provide information regarding 250 of those people. *See EEOC v. J&R Baker Farms, LLC*, No. 7:14-cv-136, 2015 WL 7185534, at *1–*2 (M.D. Ga. Nov. 13, 2015). The EEOC then came forward with just 113 individuals, while disavowing any responsibility for "the accuracy of the information" it was providing to a federal court. *See* Resp. in Opp. to Sanctions, *EEOC v. J&R Baker Farms, LLC*, No. 7:14-cv-136, at 2, 8 (M.D. Ga. Jan. 7, 2016).

In another case, the number of aggrieved women claimed by the EEOC jumped from "approximately fifty" to a figure "exceed[ing] 1,300 by several thousand." *See EEOC v. Cintas Corp.*, No. 2:04-cv-40132, slip op. at 3–4 (E.D. Mich. Apr. 15, 2015). Some of the listed women turned out to be men. *See* Joint Mot. for Consent Decree, *EEOC v. Cintas Corp.*, No. 2:04-cv-40132, at 10 (E.D. Mich. Nov. 11, 2015) ("The individuals who will receive monetary relief are

those listed [by the EEOC], except for those individuals who are male.").

In other cases, the EEOC has frustrated any meaningful conciliation, as it did in Bass Pro's case, by seeking money damages on behalf of a class while refusing to disclose its members or its size. *See, e.g.*, *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1037–40 (D. Ariz. 2013) ("Swissport was . . . faced with an amorphous number of potential claimants, making it impossible for it to evaluate its exposure and meaningfully participate in conciliation."); *EEOC v. La Rana Haw., LLC*, 888 F. Supp. 2d 1019, 1045 (D. Haw. 2012) (noting the EEOC's "obstinate refusal" to "furnish information regarding the class of unnamed 'aggrieved individuals,' the allegedly unlawful acts, or any other fact that would put Defendants on notice of the class or its claims"); *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031–33 (N.D. Ill. 1998).

The EEOC may even ignore such information during the investigation, hoping to retrieve it in discovery if the employer cannot be bullied into settling. *See* Pet'r Br. 39–40 (identifying "an EEOC strategy of attempting to coerce settlements from employers by filing an unsubstantiated allegation that a 'class' of claimants exists without ever investigating if that is in fact true"). Thus, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 814 (S.D.N.Y. 2013), the agency "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation" by "level[ing] broad accusations of class-wide discrimination to present [the employer] with a moving target of prospective plaintiffs and, after

unsuccessfully pursuing pattern-or-practice claims, substitut[ing] its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims under Section 706."

Failure to meet Title VII's pre-suit obligations is of a piece with "the EEOC's disappointing litigation conduct" in later stages. *EEOC v. Freeman*, 778 F.3d 463, 468 (4th Cir. 2015) (Agee, J., concurring). Federal courts have repeatedly condemned the agency for committing "extortion," *EEOC v. Gen. Dynamics Corp.*, 849 F. Supp. 1158, 1165 (N.D. Tex. 1994); *EEOC v. Anchor Cont'l, Inc.*, 74 F.R.D. 523, 526 (D.S.C. 1977); for "run[ning] roughshod over [citizens'] rights," *EEOC v. HomeNurse, Inc.*, No. 1:13-cv-2927, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013); for engaging in "deliberate obfuscation," *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 780 (7th Cir. 2007); and for taking positions that are "appalling," *EEOC v. Shoney's, Inc.*, 542 F. Supp. 332, 338 (N.D. Ala. 1982), "ridiculous," *EEOC v. OhioHealth Corp.*, __ F. Supp. 3d __, 2015 WL 3952339, at *5 (S.D. Ohio June 29, 2015), or "inexcusable," *EEOC v. E.J. Sacco, Inc.*, 102 F. Supp. 2d 413, 420 (E.D. Mich. 2000).

Indeed, Judge Wilkinson recently warned the EEOC that "what happened here was inexcusable. . . . Even if the agency will not acknowledge the damage that such lengthy investigation and groundless litigation can inflict on companies and their employees, we can." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J.,

concurring). The EEOC's "statutory goals and missions cannot be divorced from the manner in which those purposes are implemented. . It is not far-fetched to believe that the nation's deep commitment to combatting discrimination will be affected for good or ill by the esteem in which this important agency is held." *Id.* at 157

Such conduct has resulted in fee awards and sanctions against the EEOC. *See, e.g.*, *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 591–92 (6th Cir. 2013); *EEOC v. TriCore Reference Labs.*, 493 F. App'x 955, 960–61 (10th Cir. 2012); *EEOC v. W. Customer Mgmt. Grp., LLC*, No. 3:10-cv-378, 2014 WL 4435980, at *1 (N.D. Fla. Sept. 8, 2014); *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, No. 1:13-cv-46, 2014 WL 1689727, at *1 (M.D.N.C. Apr. 29, 2014); *EEOC v. Original Honeybaked Ham Co. of Ga., Inc.*, No. 11-cv-2560, 2013 WL 752912, at *4 (D. Colo. Feb. 27, 2013). According to one report, "[t]oday's EEOC is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses that are embarrassing to the agency and costly to taxpayers. Courts have found EEOC's litigation tactics to be so egregious they have ordered EEOC to pay defendants' attorney's fees in ten cases since 2011." MINORITY STAFF. OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 113TH CONG., EEOC: AN AGENCY ON THE WRONG TRACK? 3 (Comm. Print 2014), *available at* http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf.

As one Commissioner recently confessed to her colleagues, the EEOC's "reputation and credibility

[have] suffered from several recent lawsuits where we were not only sanctioned, but openly chastised by the courts." Memorandum from Constance S. Barker, Commissioner, EEOC, to EEOC Chairman & Commissioners 4 (May 23, 2014). Given the EEOC's track record, in pre-suit administrative proceedings and beyond, the Court should not limit the power to award attorneys' fees under 42 U.S.C. § 2000e-5(k). The defendants were clearly the prevailing parties in such cases. Fee awards will serve their intended purpose: "[T]o protect defendants from burdensome litigation having no legal or factu basis," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978), by shepherding the EEOC's efforts in accordance with "the nation's deep commitment to combatting discrimination," *Propak*, 746 F.3d at 157 (Wilkinson, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 14-1375

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TRUCKING ASSOCIATIONS, INC., AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

American Trucking Associations, Inc. (ATA) is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including before this Court.

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have $7.2 trillion in annual revenues and nearly 16 million employees. BRT member companies comprise more than a quarter of the total value of the U.S. stock market and pay more than $230 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amici curiae* where, as here, significant business interests are at stake.

SUMMARY OF ARGUMENT

This case presents the question of which party should pay for undisputedly illegal conduct by the government that injured a private organization.

The U.S. Equal Employment Opportunity Commission ("EEOC") is a federal law enforcement agency that violated Title VII of the Civil Rights Act of 1964 ("Title VII") when it sued Petitioner CRST Van Expedited, Inc. ("CRST"). It violated Title VII because it filed a class action-like lawsuit against CRST and sought relief for 67 individuals it first identified *after* it filed suit. Title VII, however, requires the EEOC to comply with a multi-step *pre-suit* process *before* it can file suit, 42 U.S.C. § 2000e–5(b) & (f)(1), and EEOC did *nothing* pre-suit with regard to these 67 individuals.

Title VII's pre-suit requirements mandate that the EEOC investigate, evaluate, and conciliate employment discrimination charges in an effort to resolve Title VII disputes quickly, informally, and privately to the fullest extent possible. § 2000e–5(b). Only if the EEOC engages in the full process without

success may it initiate suit. *See* § 2000e–5(f)(1). This framework, which is central to the entire enforcement scheme created for Title VII, reflects congressional goals of providing employers and employees alike the opportunity to resolve employment discrimination claims rapidly and without expensive litigation.

The EEOC's failure to follow its pre-suit statutory obligations eliminated any chance of pre-suit resolution, resulted in years of unnecessary litigation, and illegally forced the defendant-petitioner, CRST Van Expedited, Inc. ("CRST") to incur millions of dollars in attorney's fees and to suffer reputational injury as well. Faced with the EEOC's statutorily improper "sue first, ask questions later" approach, the district court properly exercised its discretion in applying Title VII's fee-shifting provision, 42 U.S.C. § 2000e–5(k), to order the EEOC to pay CRST's fees.

Amici, as representatives of employers that face EEOC investigations and attempt to conciliate with the agency in an effort both to avoid litigation and to redress any actual wrongdoing, are ideally situated to speak to the impact of the EEOC's shortcomings and the propriety of the district court's discretionary award of fees in response to EEOC illegality.

First, Title VII grants broad discretion to district courts to award a reasonable attorney's fee to a prevailing party. Under this Court's precedents, a prevailing party is one who wins a final judgment that has *res judicata* effect.

Under that standard, CRST is a prevailing party because the district court entered judgment in its favor after concluding that the EEOC wholly failed to

engage in its statutorily-required pre-suit obligations. The Eighth Circuit affirmed that determination in relevant part back in 2012, and the EEOC chose not to seek certiorari. As a result, CRST has prevailed and is eligible for attorney's fees.

Second, this Court has explained that a district court has discretion to award attorney's fees to prevailing defendants if the court determines that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The district court in this case acted well within its discretion when it concluded that the EEOC's actions violated this standard; indeed, the court found that the EEOC wholly ignored its statutory obligations and skipped its pre-suit requirements with respect to the 67 claimants.

Third, the structure and history of Title VII demonstrate that the statutory provisions the EEOC violated here are central to the enforcement scheme Congress enacted in hopes of resolving alleged Title VII violations promptly and without litigation if possible. That statutory framework envisions the EEOC as an investigator and facilitator of employment discrimination claims first, with litigation following only as a last resort. By wholly ignoring that framework, the EEOC both disobeyed express congressional direction and deprived CRST and the 67 claimants of the due-process-like protections Congress implemented to resolve Title VII claims more quickly and efficiently than the years of costly litigation imposed here by the EEOC's failures.

Finally, the EEOC cannot avoid responsibility for its illegal conduct by incorrectly asserting that a single sentence in last term's decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), mandated that a stay is the only proper remedy for EEOC failures to comply with all pre-suit obligations. *Mach Mining* dealt only with the final of several steps in the pre-suit process that the EEOC violated here, and the Court merely noted that a district court may exercise its discretion to stay a case for sixty days "to obtain voluntary compliance" with Title VII. § 2000e–5(f)(1). That reference is nothing more than an indication that a court possesses discretionary authority to stay a case for conciliation proceedings and does not mandate a "do-over" for the EEOC when it fails to engage in *any* of its pre-suit obligations. The EEOC significantly over-reads *Mach Mining* and the statutory text that *Mach Mining* cited.

ARGUMENT

I. CRST IS ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. § 2000e–5(k).

Under a straightforward application of statutory text and this Court's precedents, the district court properly applied its broad discretion to award CRST attorney's fees in light of the EEOC's indisputable violation of Title VII. Title VII authorizes a court "in its discretion" to award "a reasonable attorney's fee" to a "prevailing party." § 2000e–5(k). A prevailing party includes any party that has obtained a final judgment with *res judicata* effect; in other words the ultimate winner of a suit. And this Court has explained that when a Title VII defendant prevails, a district court may award fees against a plaintiff so

long as it concludes "in its discretion" that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421. CRST satisfied both requirements in this case.

A. A party who obtains a favorable judgment is a "prevailing party" under § 2000e–5(k).

As to the first requirement under § 2000e–5(k), a party that obtains a final judgment with *res judicata* effect is a "prevailing party." This Court on numerous occasions has interpreted the term "prevailing party" in the context of federal fee-shifting provisions, which are "interpreted . . . consistently" with one another. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 & 603 n.4 (2001) (citing § 2000e–5(k) and other examples). In interpreting such statutes, this Court has defined prevailing party as one "'in whose favor a judgment is rendered, regardless of the amount of damages awarded.'" *Id.* (quoting Black's Law Dictionary 1145 (7th ed. 1999)). At other times it has elaborated on the prevailing party inquiry as requiring a "legal victor[y]," *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), and explained that a party prevails if it can point to "a resolution of the dispute which changes the legal relationship between" or causes a "material alteration of the legal relationship of the parties." *Tex. St. Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792-93 (1989).

In applying these principles, it is the fact of judgment—that a party won—that matters, not the basis on which judgment was entered, and this Court has never suggested otherwise. In the context of a prevailing defendant, it matters not whether

judgment is entered because a plaintiff falls short on an element of his substantive claim, lacks standing, fails to satisfy a statute of limitations or repose, disregards statutory pre-suit requirements, or violates some other required provision. In any of these scenarios the defendant is the "party in whose favor a judgment is rendered," *Buckhannon*, 532 U.S. at 603 (citation omitted), because the case has ended in defendant's favor with *res judicata* effect against the plaintiff. Said another way, the defendant is the "ultimate winner" of the case. *See id.* at 642 n.14 (Ginsburg, J., dissenting). A final judgment victory is far from the kind of "transient victory at the threshold of an action" that this Court has cautioned fails to establish prevailing party status. *Sole v. Wyner*, 551 U.S. 74, 78 (2007); *see also, e.g.*, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam) (reversing attorney's fee award because reversal of directed verdict established only that respondents were entitled to a new trial, not that they were prevailing parties). Instead, a defendant is a prevailing party under § 2000e–5(k) and similar fee provisions when the plaintiff "leaves the courthouse emptyhanded," *Sole*, 551 U.S. at 78, and can no longer pursue the same claims due to a judicial determination.

B. CRST is a prevailing party under § 2000e–5(k).

CRST is just such a prevailing party. There is no dispute that it is the "ultimate winner" who obtained a judgment in its favor. In 2009 the district court dismissed EEOC's suit against CRST in full, noting "THAT Plaintiff Equal Employment Opportunity Commission takes nothing and this action is

dismissed." Docket 279, *EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95-LRR (N.D. Iowa Oct. 1, 2009); *see also EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95-LRR, 2009 WL 2524402, at *16 (N.D. Iowa Aug. 13, 2009) (order explaining judgment). In 2012 the Eighth Circuit affirmed that dismissal in relevant part, agreeing with the district court that "the EEOC wholly failed to satisfy its statutory pre-suit obligations." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 677 (8th Cir. 2012).

After the Eighth Circuit denied rehearing and rehearing en banc, *id.* at 658, the EEOC chose not to petition for certiorari. The district court then entered judgment in favor of CRST on the claims of the 67 individuals at issue in this case. *See* Dockets 381 & 381-1, *CRST Van Expedited, Inc.*, No. 07-cv-95-LRR (Feb. 11, 2013). That judgment dismissed EEOC's claims with prejudice and thus had *res judicata* effect. Under those facts, CRST is a prevailing party in this litigation for purposes of § 2000e–5(k).

C. A prevailing defendant is entitled to attorney's fees if the plaintiff's suit was "frivolous, unreasonable, or without foundation."

Once a party prevails in litigation, § 2000e–5(k) authorizes the district to award attorney's fees "in its discretion." A prevailing defendant is entitled to fees if the district court concludes "that the plaintiff's action was frivolous, unreasonable, or without

foundation, even though not brought in subjective bad faith." *Christiansburg*, 434 U.S. at 421.[2]

In adopting this standard, the Court balanced a need for effective Title VII enforcement with congressional goals "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought." *Id.* at 420 (citations and footnotes omitted). It ultimately concluded that Congress in enacting § 2000e–5(k) "wanted to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420.

One obvious way for a lawsuit to be "unreasonable" or "without foundation" occurs when the government itself violates the law and correspondingly injures a private person or organization. This kind of case presents the same type of situation addressed in *Christiansburg*, where this Court explained that a district court should ordinarily award a reasonable attorney's fee to a prevailing plaintiff because the prevailing plaintiff has established that the defendant is "a violator of federal law." *Id.* at 418; *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who

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[2] Prevailing plaintiffs, by contrast, are presumed to be entitled to attorney's fees in all but special circumstances. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975); *but see Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535-39 (1994) (Thomas, J., concurring in the judgment) (*Christiansburg* incorrectly applied a more stringent standard to prevailing defendants by "*mistakenly cast[ing] aside the statutory language to give effect to equitable considerations*").

has committed a legal wrong."). In effect, a plaintiff who prevails in a Title VII case typically demonstrates unreasonable behavior by proving that the defendant violated the law.

In fact, the government has taken this very position. In *Zipes*, the government argued that "those who violate federal law should redress those whose rights have been violated." Br. for the United States and the EEOC as Amici Curiae, *Zipes*, 491 U.S. 754 (No. 88-780), 1989 WL 1127747, at *12. It further told this Court that "[a]n award of fees . . . serves the equitable purpose of redressing a wrong, and of deterring similar wrongs in the future." *Id.* at *6.

In the same way, a defendant who prevails against the government when the government violates the law in a Title VII case prevailed because the government committed a "legal wrong" and is a "violator of federal law." *Christiansburg*, 434 U.S. at 418. A district court may exercise its broad discretion in such cases and award a reasonable attorney's fee to the defendant.

D. The district court correctly concluded that the EEOC's illegal conduct justified an attorney's fee award.

The EEOC is the *only* proven lawbreaker in this case. The district court properly awarded a reasonable attorney's fee to CRST.

Title VII requires the EEOC to undertake detailed, specific steps before it may initiate litigation, including receiving a charge of discrimination; providing notice of the charge to the respondent within ten days of its filing; investigating the charge; making a determination about whether

there is reasonable cause to believe the charge is true; and attempting to resolve any violation through informal methods of conference, conciliation, and persuasion. *See* § 2000e–5(b) & (f)(1). In this case, the EEOC indisputably and utterly failed to comply with the mandatory pre-suit investigation, reasonable cause, and conciliation requirements with respect to the 67 individuals at issue. As a result, the EEOC comes to this Court as a judicially-determined law-breaker. And its violations were egregious. The EEOC violated multiple steps of Title VII's pre-suit process, filed a massive class action lawsuit against CRST without even identifying or investigating *any* of the 67 individuals, blasted CRST with an inflammatory press release about serious civil rights violations, dragged CRST through years of unnecessary litigation, wasted the scarce resources of the federal courts, and forced CRST to spend millions of dollars to defend itself. CRST should not have to foot the bill for the government's misconduct.

The Eighth Circuit's 2012 decision upholding in relevant part the district court's dismissal recognized that "the EEOC wholly failed to satisfy its statutory pre-suit obligations." *CRST Van Expedited*, 679 F.3d at 677. It "did not investigate the specific allegations of *any* of the 67 allegedly aggrieved persons . . . until after the Complaint was filed," and made no reasonable cause determination. *Id.* at 676-77. As a result, the court concluded that "[a]bsent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate." *Id.* That is as clear a finding that the EEOC violated Title VII as anyone could ask.

The Eighth Circuit's decision further illustrated the EEOC's overreach. It explained that its "review of the undisputed facts demonstrates that the EEOC was 'using discovery in the resulting lawsuit as a fishing expedition to uncover more violations.'" *Id.* (quoting *EEOC v. Dillards, Inc.*, No. 08-cv-1780-IEG (PCL), 2011 WL 2784516, at *7 (S.D. Cal. July 14, 2011)). This conclusion was clearly correct, for the court elsewhere noted that the EEOC "did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's 'class' until after it filed the Complaint" and even told CRST prior to filing its complaint "that it did not know" the size of the class. *Id.* at 673. As a result, the court explained that there is "a clear and important distinction between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit." *Id.* at 675.

The district court opinion underlying the Eighth Circuit's decision was even more pointed in explaining the illegality of EEOC's conduct under Title VII. It held that "[t]he record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case." *CRST Van Expedited*, 2009 WL 2524402, at *16; *see also id.* at *19 ("EEOC did not investigate, issue a reasonable cause determination[,] or conciliate the claims of the 67 allegedly aggrieved persons"). The district court observed that long after EEOC filed its suit, it "sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit" and subsequently "sent another 730 solicitation letters to former CRST female employees." *Id.* at *9. The EEOC did "not make a

reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint," and the dates of alleged violations about 27 of the 67 individuals at issue postdate the EEOC's reasonable cause determination that formed the basis for its suit. *Id.* at *16. In other words, the alleged actions underlying those 27 individuals' assertions had not even occurred before the EEOC concluded that reasonable cause existed as to a handful of other, unrelated individuals. And as to 38 of the remaining 40 individuals, "the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint. The EEOC used discovery in the instant lawsuit to find them." *Id.*; *see also CRST Van Expedited*, 679 F.3d at 673-74 (these specific findings "undisputed").

The district court thus concluded that the EEOC was attempting to "bootstrap the investigation, determination[,] and conciliation of the allegations of [Charging Party Monica] Starke and a handful of other allegedly aggrieved persons into a [§ 2000e–5] lawsuit with hundreds of allegedly aggrieved persons." *CRST Van Expedited*, 2009 WL 2524402, at *16. It termed EEOC's actions an attempt "to perfect an end-run around Title VII's statutory prerequisites to suit" and worried that the EEOC's actions, if allowed, "might avoid administrative proceedings for the vast majority of allegedly aggrieved persons." *Id.* at *16, *18. Such a result would "ratify a 'sue first, ask questions later' litigation strategy on the part of the EEOC, *which would be anathema to Congressional intent*." *Id.* at *19 (emphasis added).

These conclusions are not in dispute before this Court; they are the facts of this case that must be accepted as true. The district court properly exercised its discretion when it awarded a reasonable attorney's fee to CRST.

II. THE EEOC SHOULD NOT BE ALLOWED TO SIDESTEP ITS UTTER FAILURE TO FOLLOW ITS STATUTORY OBLIGATIONS.

The EEOC should not be allowed to dodge the district court's decision to award a reasonable attorney's fee by suggesting that its indisputably illegal behavior amounted to little more than an inadvertent "fail[ure] to sufficiently investigate and conciliate." Br. in Opp. 9. The failure here was not one of "sufficiency." Rather, the EEOC wholly abandoned Title VII's mandatory, multi-step pre-suit enforcement scheme when it did *nothing* about the 67 claimants until it filed suit and used discovery to identify them. If the EEOC had investigated the 67 claimants pre-suit—as Congress required it to do—the EEOC and CRST may well have settled these matters privately and quickly to the satisfaction of the claimants, CRST, and the public interest. Instead, the claimants received nothing; EEOC's Title VII violation forced CRST to expend several million dollars to defend itself; and the EEOC's multi-year litigation about the 67 claimants wasted its own taxpayer-funded resources and the scarce resources of the federal courts.

A. Title VII's text demands that the EEOC complete an extensive series of steps before it can sue.

The text and history of Title VII's pre-suit requirements indicate that the EEOC's obligations to

engage in the charge, investigation, reasonable cause, and conciliation process are central to the statutory scheme enacted by Congress. "In pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means." *Mach Mining*, 135 S. Ct. at 1651 (citations and quotations omitted). To that end, Congress intended that litigation would be a last resort, not EEOC's first step. EEOC cannot jump over its statutory obligations and then seek to characterize its violations as technicalities to avoid paying for them.

Title VII "sets forth 'an integrated, multistep enforcement procedure'" intended to enable the EEOC "to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977)). That process does not begin with the filing of a complaint in federal court. Rather, "the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life*, 432 U.S. at 368.

Those duties are extensive and begin with the filing of a charge by or on behalf of an allegedly aggrieved party, *see* § 2000e–5(b), or by an EEOC Commissioner acting on the party's behalf. *See* 29 C.F.R. §§ 1601.7, 1601.11. Once a charge is filed, the EEOC must issue a notice to the accused entity (or "respondent") within ten days. § 2000e–5(b); *see also* 29 C.F.R. §§ 1601.7-1601.14; *Occidental Life*, 432 U.S. at 359. At that point, EEOC is statutorily required to conduct an investigation into the charge. § 2000e–5(b). If it "determines after such

investigation that there is not reasonable cause to believe that the charge is true," it must dismiss the charge and notify the parties. § 2000e–5(b); 29 C.F.R. § 1601.19(a).

If the EEOC does find reasonable cause, it must issue a reasonable cause notice to the parties. § 2000e–5(b); 29 C.F.R. § 1601.21(b). It must then "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b); 29 C.F.R. § 1601.24. As this Court noted last term, the EEOC's conciliation obligation "is mandatory, not precatory" and "serves as a necessary precondition to filing a lawsuit." *Mach Mining*, 135 S. Ct. at 1651. Additionally, conference, conciliation, and persuasion "necessarily involve communication between parties, including the exchange of information and views." *Id.* at 1652.

Only if the EEOC engages in each of these preceding steps and is "unable to secure from the respondent a conciliation agreement acceptable to the Commission" may it issue a failure of conciliation notice and finally bring suit. § 2000e–5(f)(1); 29 C.F.R. §§ 1601.25 & 1601.27; *see also Occidental Life*, 432 U.S. at 359 (pre-suit process "culminat[es] in the EEOC's authority to bring a civil action"). In fact, unless EEOC's "attempt to conciliate has failed," the EEOC may not file a claim against the employer. *Mach Mining*, 135 S. Ct. at 1651.

Congress designed these pre-suit obligations to provide procedural protections to employers and to ensure that "the victim of job discrimination" does not suffer due to "lengthy delays that too often attend Title VII litigation." *Ford Motor Co. v. EEOC*,

458 U.S. 219, 221 (1982). Such a victim "needs work that will feed a family and restore self-respect. A job is needed—now." *Id.* Each step in Title VII's statutory scheme up to the point of suit thus functions as an opportunity to resolve Title VII allegations without litigation, reflecting Title VII's "statutory goal" of "maximum possible reliance upon voluntary conciliation and administrative resolution of claims." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981). The "overriding goal is not to promote the employment of lawyers but to correct discriminatory practices quickly and effectively." *Shell Oil*, 466 U.S. at 90 (O'Connor, J., concurring in part and dissenting in part).

Reflecting this goal of avoiding litigation if at all possible, Title VII and the EEOC's procedural regulations both empower and require the investigation and remediation of alleged employment discrimination, promptly and efficiently. To enable the EEOC to investigate charges, Title VII authorizes the EEOC to compel production of witnesses, documents, and other information to the extent that information "is relevant to the charge under investigation." § 2000e–8(a); *see also* § 2000e–9; 29 C.F.R. §§ 1601.15-1601.17; *Shell Oil*, 466 U.S. at 63-64. And at any time during the pre-suit process, the EEOC "may encourage the parties to settle the charge on terms that are mutually agreeable." 29 C.F.R. § 1601.20. *Accord* EEOC Compl. Manual § 15 (explaining negotiated settlement process prior to reasonable cause determination).

In addition, Congress codified additional protections to foster pre-suit resolution of Title VII

charges. Title VII requires the EEOC to treat charges, investigations, reasonable cause determinations, and conciliation proceedings as strictly confidential. *See* § 2000e–5(b) (charge "shall not be made public by the Commission"); § 2000e–8(e) (same, investigation); 29 C.F.R. § 1601.22 (same, charge and investigation); § 2000e–5(b) (in conciliation, "[n]othing said or done during and as a part of such informal endeavors may be made public" by EEOC or used in evidence in subsequent proceedings.); *see also* 29 C.F.R. § 1601.26(a) (same); *Associated Dry Goods*, 449 U.S. at 598-604 (prohibition on disclosure prevents employees filing discrimination charge from seeing employer information unrelated to their own employment). These confidentiality protections "ensure candor" and "thereby enhance[] the prospects for agreement" without litigation. *Mach Mining*, 135 S. Ct. at 1649, 1655. Congress took these confidentiality requirements so seriously that any violation by an EEOC officer or employee is punishable by up to a year in prison and a fine of up to $1,000. §§ 2000e–5(b) & 2000e–8(e).

B. Title VII's history and this Court's precedents further emphasize the importance of EEOC's statutory obligations prior to suit.

This extensive set of EEOC statutory obligations prior to suit is no accident. Rather, Title VII's multi-step enforcement scheme is central to the EEOC structure created by Congress in 1964 and reconfirmed in 1972 when Congress authorized the EEOC to sue in its own name. *See generally Occidental Life*, 432 U.S. at 358-72; *Shell Oil*, 466 U.S. at 62-82. As enacted in 1964, "Title VII limited

the EEOC's function to investigation of employment discrimination charges and informal methods of conciliation and persuasion. The failure of conciliation efforts terminated the involvement of the EEOC." *Occidental Life*, 432 U.S. at 358-59.

Under the 1964 version of Title VII, the EEOC had no litigation authority at all, for "when it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act." *Shell Oil*, 466 U.S. at 77. Congress vested litigation authority in "the charging party, or other person aggrieved by the allegedly unlawful practice," *Occidental Life*, 432 U.S. at 359, and limited the Attorney General to intervening in cases of "general public importance" and to filing alleged "pattern or practice" cases. §§ 2000e–5(e); 2000e–6 (1964). *Accord Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 327 (1980).

Congress moved away from the voluntary compliance model in 1972 when it granted the EEOC litigation authority as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107 (1972). In doing so, however, Congress "did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation." *Shell Oil*, 466 U.S. at 78. As Representative Perkins explained in introducing the Conference Report that accompanied the House of Representatives' version of the 1972 amendments:

> The conferees contemplate that the Commission will continue to make every

> effort to conciliate as is required by existing law. Only if conciliation proves impossible do we expect the Commission to bring action in Federal district court.

118 Cong. Rec. 7563 (1972). In other words, Congress retained the charge, investigation, reasonable cause, and conciliation requirements that were previously the sole actions the EEOC could take. Congress added a final step in that process—litigation—that the EEOC could only pursue *after* it satisfied the pre-suit requirements of § 2000e–5.

Congress' decision to grant the EEOC litigation authority and to retain Title VII's multi-step pre-suit process was a compromise that came after several members of the House and Senate expressed concern about granting the EEOC too much prosecutorial power. *See Occidental Life*, 432 U.S. at 361 ("The dominant Title VII battle in [1972] was over what kind of additional enforcement powers should be granted to the EEOC."). Initial drafts of the 1972 bill contemplated that EEOC employees would serve as investigators, prosecutors, and administrative law judges ("ALJs"). *See* S.2515, 92d Cong. § 4(a) (as introduced to the Senate Sept. 14, 1971). EEOC ALJs would have been granted authority to issue cease-and-desist orders. Such orders would have been reviewed on a deferential basis by courts. *Id.* § 4(a) (proposed subsection (k) noting "substantial evidence" standard in federal courts).

Members of both Houses of Congress decried giving the EEOC cease-and-desist power. They warned that such power was dangerous, contrary to

constitutional due process protections, and downright un-American.

For example, Senator Dominick cautioned that the proposed cease-and-desist process would "harken[] back to the 'Star Chamber' proceedings outlawed in England more than 300 years ago. That is, the EEOC would, in effect, become investigator, prosecutor, trial judge and judicial review board—all before you ever got to the Court of Appeals!" 117 Cong. Rec. 40290 (1971). Representative Martin objected that "[t]he committee bill . . . would set up this five-man EEOC board to be the investigator, the prosecutor, the judge, and the jury of these cases. An employer would be considered guilty until he proves himself innocent. . . . This is a very, very dangerous piece of legislation." 117 Cong. Rec. 31959 (1971). Representative Broomfield agreed, warning that cease-and-desist authority "would be similar to letting policemen arrest, try, and punish citizens on the street at the point of a gun." 117 Cong. Rec. 32106 (1971). And Representative Ashbrook observed that the "real purpose of granting additional powers for the EEOC is to give it more authority than it deserves or should properly have," while expressing concern that the agency would use its "blackjack authority" to force employers to comply with its whims. 117 Cong. Rec. 32101 (1971).

Adding to these concerns about allowing the EEOC to act with "czar-like powers of policeman, prosecutor, judge and jury," 118 Cong. Rec. 732 (1972) (statement of Sen. Brock), was a perception by some that the EEOC was far from a neutral decisionmaker that could be trusted to render fair judgments. Senator Saxbe worried that EEOC

officials "tend to have an ax to grind. They are people who are very zealous." 118 Cong. Rec. 731 (1972). Senator Allen explained that "[t]he Commission . . . has not been and is not now the impartial agency it was supposed to be and as charged to be by law" and stated that the EEOC "has been a rabid advocate of its own preconceived ideas." 118 Cong. Rec. 932 (1972); *see also* 118 Cong. Rec. 1657 (1972) (statement of Sen. Ervin) ("virtually all" of the EEOC commissioners to date "were men who were psychologically incapable of holding the scales of justice evenly, because they were so biased in favor of the policy of the bill that they could not appraise impartially the truth involved in the proceedings"); *see also* 118 Cong. Rec. 1976 (1972) (statement of Sen. Ervin) (EEOC should not be given "autocratic power" because it "has ordinarily been staffed in the past . . . by crusaders for a cause").

These concerns and others like them led to the introduction and eventual passage of substitute bills in both the House and the Senate. The revised bill authorized the EEOC "to file federal-court actions rather than conduct its own hearings and issue cease-and desist orders" following conciliation. *Occidental Life*, 432 U.S. at 363 (House bill); *id.* at 363-64 (same; Senate bill). As Senator Dominick explained at an early stage in the proceedings, this approach properly balanced "the need to give EEOC enforcement powers and the rights of those charged with violations of the law" by "provid[ing] a combination of the expertise of the EEOC in investigating, processing, and conciliating unfair employment cases with the expertise and independence of the Federal courts." 117 Cong. Rec. 34116 (1971).

In establishing this framework, Congress sought to avoid creating an EEOC that would function as investigator, prosecutor, judge, fact-finder, and appellate tribunal. It therefore retained the original pre-suit obligations and required that litigation would ensue only after the EEOC satisfied each step of the process and only after a resolution proved impossible.

C. Section 2000e–5(k) authorizes district courts to award a reasonable attorney's fee in appropriate cases to prevent the EEOC from abusing its authority.

Allowing the EEOC to violate its charge, investigation, reasonable cause, and conciliation requirements with impunity would have the practical effect of leaving "compliance with the law" "in the Commission's hands alone." *Mach Mining*, 135 S. Ct. at 1652. This Court last term recognized that a lack of judicial review over the EEOC's conciliation obligations would render the conciliation requirement a nullity. *Id.* at 1652-53. That same concern applies with equal force to Title VII's fee provision. Unless defendants subject to the EEOC's illegal behavior have recourse to § 2000e–5(k), the EEOC will continue to impose substantial costs on defendants who never should have been sued in the first place. As *Mach Mining* recognized, "legal lapses and violations occur, and especially so when they have no consequence." 135 S. Ct. at 1652-53; *cf. also Shell Oil*, 466 U.S. at 90 (O'Connor, J., concurring in part and dissenting in part) ("Experience teaches that Government administrative agency investigations can be prone to abuse").

That recognition is particularly relevant here. The EEOC asserts that it can violate its Title VII obligations with impunity, impose millions of dollars in costs and attorney's fees as well as significant reputational harm on a defendant yet avoid *any* consequences for its illegal behavior. Despite the EEOC's insistence that Title VII gives it a free pass to violate the law, § 2000e–5(k) recognizes that defendants should not bear the financial burden of the EEOC's illegal misconduct. *See Christiansburg*, 434 U.S. at 422 n.20 ("expense of defending even a frivolous claim may become a strong disincentive to the exercise of [defendants'] legal rights").

The EEOC's violation of § 2000e–5(b)'s requirements in this case is even worse because Congress vested the EEOC with authority to enforce Tile VII and express authority to issue "suitable procedural regulations." § 2000e–12(a). EEOC exercised that authority, *see* 29 C.F.R. § 1601.1, *et seq.*, and its regulations implementing § 2000e-5's procedural requirements both bind the EEOC and demonstrate its awareness of Title VII's mandatory pre-suit requirements. *See Shell Oil*, 466 U.S. at 67 (EEOC's procedural regulations "binding on the Commission"). Accordingly, when, as in this case, the EEOC violates Title VII and imposes millions of dollars in legal fees on defendants, it should not and cannot escape responsibility for its actions.

If anything, the EEOC should be held to a higher standard based on its role as enforcer of Title VII. Indeed, *Christiansburg* explained that when considering whether to award attorney's fees against the EEOC, "a district court may consider distinctions between the Commission and private plaintiffs in

determining the reasonableness of the Commission's litigation efforts." 434 U.S. at 422 n.20. Unlike a private plaintiff, who in most situations presumably lacks legal training of any kind, the EEOC is statutorily charged with responsibility for enforcing Title VII. And, EEOC routinely touts its experience and asks this Court and other courts to defer to its interpretations of Title VII. *See, e.g.*, Br. for the United States as Amicus Curiae, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536939, at *26-*29 (arguing for *Skidmore* deference to the EEOC's interpretation of Title VII); *Young*, 135 S. Ct. at 1351-52 (declining to give deference because the EEOC promulgated interpretation only recently and because interpretation was inconsistent with prior government litigating positions). It is entirely reasonable to expect EEOC to remain aware of its legal obligations and to accept the consequences when it ignores them. In fact, the EEOC just last year told a Senate committee that its "statutory authority does not contemplate or permit" a strategy of "suing first, and asking questions later." Statement of EEOC General Counsel P. David Lopez to Sen. Comm. on Health, Educ., Labor & Pensions at 6, May 19, 2015, http://www.help.senate.gov/imo/media/doc/Lopez3.pdf; *see also* Statement of EEOC Chair Jenny R. Yang to Sen. Comm. on Health, Educ., Labor & Pensions at 2, May 19, 2015, http://www.help.senate.gov/imo/media/doc/Yang.pdf (litigation is "last resort").

Instead of owning up to its shortcomings, the EEOC claims that a determination of the unreasonableness of its behavior "depends on an assessment of the merits of the plaintiff's claims for

relief." Br. in Opp. 10. That statement is wrong. Of course, there is no doubt that the EEOC *could* behave unreasonably if it brought a suit that lacked any basis in fact. But *Christiansburg* did not hold, nor is it reasonable to posit, that the government should pay attorney fees only if it unreasonably asserts misconduct that never occurred. If anything, it is even more unreasonable for the EEOC to bring claims it has no statutory right to bring due to its decision to skip multiple statutory preconditions to suit. As this Court explained years ago in rejecting another EEOC attempt to avoid a Title VII requirement it did not like, "the Commission's argument is merely one of administrative convenience, and such convenience cannot override the prohibitions in the statute." *Associated Dry Goods*, 449 U.S. at 604. The EEOC's misplaced "merits" argument assumes that it can ignore its statutory obligations, file a suit illegally, impose the costs of years of litigation on defendants, and then escape responsibility by suggesting that it *might* have had a case if it had bothered to act as the law requires. Stripped of its rhetoric, that argument does not exonerate the EEOC; it illustrates the EEOC's unreasonableness.

Similarly, the EEOC elsewhere asserts that its disregard of the law was reasonable "because the district court's decision in this case was the first to impose" a requirement that the EEOC investigate, issue reasonable cause findings, and conciliate with each individual claimant. Br. in Opp. 20. That assertion is false. Prior to the EEOC's filing of this lawsuit, courts in at least nine circuits, including the Eighth Circuit, had dismissed all or significant parts of EEOC cases when the EEOC violated its pre-suit

obligations.[3] It is not surprising that so many courts have held the EEOC to its pre-suit obligations because those obligations have remained the same since 1972. And, even if the EEOC dubiously claims that it could not understand the clear import of its statutory obligations under § 2000e–5(b), courts had repeatedly informed it of its obligations. It just chose to ignore them. Given this, the district court properly exercised its discretion to determine that the EEOC was a "violator of federal law,"

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[3] *See, e.g.*, **First Circuit**—*EEOC v. IBEW*, 476 F. Supp. 341, 346-48 (D. Mass. 1979); **Second Circuit**—*EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981); **Third Circuit**—*EEOC v. E. Hills Ford Sales, Inc.*, 445 F. Supp. 985, 987-88 (W.D. Pa. 1978); *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1303, 1307 (W.D. Pa. 1977); *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1332, 1334 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); **Fourth Circuit**—*Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976); *EEOC v. W. Elec. Co.*, 382 F. Supp. 787, 793-95 (D. Md. 1974); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985, 992-94 (D. Md. 1974); *EEOC v. Firestone Tire & Rubber Co.*, 366 F. Supp. 273, 278 (D. Md. 1973); **Fifth Circuit**—*EEOC v. Argo Distrib., LLC*, No. 04-cv-322-KS-MTP, 2007 WL 1031649, at *3 (S.D. Miss. Mar. 30, 2007, *aff'd*, 555 F.3d 462 (5th Cir. 2009); *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam); **Seventh Circuit**—*EEOC v. Target Corp.*, No. 02-cv-146, 2007 WL 1461298, at *3-*4 (E.D. Wis. May 16, 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 978-85 (S.D. Ind. 2003); **Eighth Circuit**—*EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 947-49 (8th Cir. 1974); **Ninth Circuit**—*EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982); **Eleventh Circuit**—*EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259-61 (11th Cir. 2003); *EEOC v. Nat'l Cash Register Co.*, 405 F. Supp. 562, 564-67 (N.D. Ga. 1975); *EEOC v. King's Daughter's Hosp.*, 1976 BL 450, at *6-*7 (S.D. Miss. Jan. 12, 1976); *EEOC v. U.S. Pipe & Foundry Co.*, 375 F. Supp. 237, 241-48 (N.D. Ala. 1974); *EEOC v. Container Corp.*, 352 F. Supp. 262, 266 (M.D. Fla. 1972).

Christiansburg. 434 U.S. at 418, and that CRST was entitled to reasonable attorney's fee.

III. *MACH MINING* PROVIDES NO SUPPORT FOR THE EEOC HERE

Last term, *Mach Mining* resoundingly reaffirmed the importance of conciliation proceedings under § 2000e–5(b). There, the Court rejected the EEOC's argument that its total failure to conciliate could not be reviewed, explaining that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651. In spite of this rebuke, EEOC has subsequently seized upon a single sentence at the end of *Mach Mining* to assert that this Court somehow limited the relief courts can provide, even in cases like the present involving undisputed EEOC violations of Title VII. The EEOC's assertion misconstrues the statutory text of § 2000e–5(f)(1), misinterprets *Mach Mining*, and relies on an inaccurate sleight-of-hand regarding the different roles EEOC has at different points in its pre-suit obligations under § 2000e–5(b).

A. The EEOC incorrectly interprets *Mach Mining* as mandating a stay for any EEOC violation of Title VII.

The sentence on which the EEOC places such weight states:

> Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. *See* § 2000e–5(f)(1) (authorizing a stay of a Title VII action for that purpose).

Mach Mining, 135 S. Ct. at 1656.

The EEOC has since over-read this single sentence as applying far beyond the conciliation context in which it was made. It has asserted, including in this case, that *Mach Mining* limits judicial power for violation of *any* of EEOC's statutory pre-suit obligations to ordering a "do-over" and that neither dismissal nor a fee award can ever be appropriate, regardless of the EEOC's misconduct. *See* Br. in Opp. 12 n.2 (asserting that "the Court recognized [in *Mach Mining*] that the appropriate remedy for the EEOC's failure to fulfill a pre-suit condition is to give the EEOC the opportunity to fulfill that condition, not to dismiss the case outright"); *see also, e.g.*, Rule 28(j) Letter at *1-*2, *EEOC v. Sterling Jewelers, Inc.*, No. 14-1782 (2d Cir. Apr. 30, 2015), (EEOC arguing that *Mach Mining*'s stay reference applied to failure to investigate). Thus, the EEOC asserts that a stay is the only remedy a court can impose in its discretion for *any* violation of § 2000e–5(b)'s charge, investigation, reasonable cause, or conciliation requirements. The EEOC is wrong.

B. The statutory text and *Mach Mining* itself demonstrate that the Court was speaking only of conciliation.

Each phrase of the statutory text of the stay provision undercuts the EEOC's position. The statute states:

> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending . . . further efforts of the Commission to obtain voluntary compliance.

§ 2000e–5(f)(1).

By its terms, § 2000e–5(f)(1) requires a "request" by one of the parties. A court then "may, in its discretion, stay further proceedings," but the statute limits any stay to "not more than sixty days." *Id.* And the sole purpose of such a requested, time-limited stay is for "further efforts of the Commission to obtain voluntary compliance." *Id.* Section 2000e-5(f)(1) does not authorize a court to "stay further proceedings" for any purpose other than an attempt "to obtain voluntary compliance"—i.e., for conciliation purposes. The EEOC's interpretation of *Mach Mining* is in conflict with several requirements that flow from this statutory text.

First, without any request, the stay provision does not even apply. The EEOC is therefore wrong when it asserts that a stay is the mandatory remedy for a violation of its pre-suit obligations.

Second, the statute indicates that "the court may, in its discretion" grant a stay. *Id.* Contrary to the EEOC's assertions, that language indicates that a stay is subject to a court's wide discretion to fashion appropriate remedies and implicitly leaves open other avenues of relief.

Third, § 2000e–5(f)(1) limits any stay to "not more than sixty days." However, pre-suit investigations almost always take far longer than sixty days, rendering application of the stay provision to such requirements illogical. *Occidental Life* recognized that there is no statute of limitations for filing suit under Title VII, either in the statute or by reference to comparable state limitations periods. 432 U.S. at 360-72. The EEOC's investigative process can take years. *See, e.g., id.* at 358 (charge

formally filed with the EEOC on March 9, 1971 but suit not filed until February 22, 1974); *Ford Motor*, 458 U.S. at 221-23 (charges filed in June and July 1971 but suit not filed until July 1975). In this case, the charge was filed December 1, 2005, and EEOC filed suit on September 27, 2007. *See CRST Van Expedited*, 679 F.3d at 666, 668. These already lengthy timelines do not even include the possibility of a dispute during investigation, which could add additional litigation over EEOC's right to compel production of information. *Shell Oil* is instructive in this regard. There, the EEOC's chair issued a charge on September 27, 1979. The parties disputed EEOC's authority; EEOC issued a subpoena; and this Court issued its decision about the subpoena dispute on April 2, 1984, before the EEOC decided whether to issue a reasonable cause determination. *Shell Oil*, 466 U.S. at 54, 57.

In other words, it makes no sense to interpret § 2000e–5(f)(1)'s sixty-day time limit as applying to investigations because that time period provides inadequate time for an investigation.

Fourth and most critically, § 2000e–5(f)(1)'s stay provision applies only for "further efforts of the Commission *to obtain voluntary compliance*." (emphasis added). That language is an express reference to conciliation, not to EEOC's independent charge, investigation, and reasonable cause duties.

As a result of this statutory structure and text, it is no surprise that *Mach Mining* itself does not make the sweeping statement EEOC claims it made. As noted, *Mach Mining* involved only conciliation, the last step before litigation in Title VII's "overall enforcement structure [of] a sequential series of

steps beginning with the filing of a charge with the EEOC." *Occidental Life*, 432 U.S. at 372. *See Mach Mining*, 135 S. Ct. at 1650 (noting charge, investigation, and reasonable cause determination and recognizing that petitioner asserted only "that the EEOC had failed to 'conciliate in good faith' prior to filing suit"). Regardless whether a stay is proper following the EEOC's failure to comply with its statutory duty to conciliate, *Mach Mining* simply had no reason to reach more broadly to other, independent statutory pre-suit duties and does not address them. Instead, *Mach Mining* hews closely to the statutory text of § 2000e–5(f)(1). Even the sentence the EEOC over-reads references only "efforts to obtain voluntary compliance," 135 S. Ct. at 1656, a carefully-cabined statement clearly limited to conciliation.

For all of these reasons, EEOC is wrong when it claims that a stay under § 2000e–5(f)(1) is always "the appropriate remedy for the EEOC's failure to fulfill a pre-suit condition." Br. in Opp. 12 n.2.

C. The EEOC's interpretation is also wrong because it is impossible for the EEOC to act as the neutral investigator once it has filed suit.

Beyond the EEOC's atextual reading of § 2000e–5(f)(1) and *Mach Mining*, a stay cannot be the exclusive remedy for EEOC pre-suit statutory violations because there is no way for the EEOC to act as a neutral investigator once it has prematurely concluded that a Title VII respondent is a lawbreaker and filed suit. Critical differences in the relationship between the EEOC and Title VII respondents at different stages in the pre-suit

process raise due process concerns with pretending that EEOC can go back in time once it has moved from neutral investigator to adversary.

As already noted, § 2000e–5(b) sets out several different phases in an EEOC action. At the charge, investigation, and reasonable cause stages, the Title VII respondent stands accused of Title VII violations, and the EEOC functions as a neutral investigator of the allegations and facts. If the EEOC concludes after its investigation that there is no reasonable cause to believe a violation occurred, it simply dismisses the charge and notifies the parties. § 2000e–5(b); 29 C.F.R. § 1601.19(a).

However, the EEOC's role changes dramatically if it "determines after such investigation that there is reasonable cause to believe that the charge is true," § 2000e–5(b), and issues a reasonable cause notice. 29 C.F.R. § 1601.21(a)-(b). At that point, the EEOC is no longer neutral; instead, "the matter assume[s] the form of an adversary proceeding." *Shell Oil*, 466 U.S. at 68. The EEOC assumes a prosecutorial function and seeks to remedy what it regards as a violation of the law. Said another way, a reasonable cause determination triggers the EEOC's obligation to engage in "informal methods of conference, conciliation, and persuasion" with a goal of "endeavor[ing] to eliminate" the violation it believes occurred. § 2000e–5(b); 29 C.F.R. § 1601.24. And if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable" to it, it may so declare and bring suit. § 2000e–5(f)(1); 29 C.F.R. § 1601.25.

Once the EEOC has proceeded past the reasonable cause determination, it is working "to

eliminate any such alleged unlawful employment practice." § 2000e–5(b). There is a substantial due process and fundamental fairness problem with pretending that the EEOC could reopen (or initiate in the first instance) a new, unbiased investigation. That problem only grows once the EEOC files suit and begins actively litigating against a defendant.

The district court in its merits review of this case recognized these challenges. It was aware of its authority, whether inherent or under § 2000e–5(f)(1), to stay the proceeding in response to EEOC's legal violations, for it noted that "might have stayed the instant action for further conciliation in lieu of dismissal." *CRST Van Expedited*, 2009 WL 2524402, at *19 n.24. But it recognized that a stay was improper when the EEOC had "wholly abdicated its role in the administrative process." *Id.* And the Eighth Circuit affirmed that decision in 2012, explaining that "contrary to the EEOC's contention, the district court did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint." *CRST Van Expedited*, 679 F.3d at 677. EEOC again chose to let the Eight Circuit's mandate issue on that ruling. It cannot rely on any argument to the contrary in its attempt to avoid paying fees now.

CONCLUSION

For the reasons stated above and by Petitioner, the decision below should be reversed.

Respectfully submitted,

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IN THE

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CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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IN THE

Supreme Court of the United States

No. 14-1375

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* in support of Petitioner and of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this matter regarding the propriety of awarding attorney's fees to a prevailing defendant where the EEOC's failure to investigate or attempt conciliation results in dismissal of a subsequent Title VII lawsuit. The court below ruled, erroneously, that an award of attorney's fees and costs is unavailable in the absence of a judicial determination on the merits of the underlying claim, and that dismissal for failure to investigate or conciliate does not constitute a merits decision.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

On September 27, 2007, Respondent U.S. Equal Employment Opportunity Commission (EEOC) commenced a civil action against Petitioner CRST Van Expedited, Inc. (CRST), accusing it of engaging in unlawful sex discrimination against a class of mostly unidentified women, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Pet. App. 34a. The suit was based on a single charge of discrimination filed in December 2005 by charging party Monika Starke alleging that she had been sexually harassed by two male drivers who were assigned to train her. Pet. App. 165a.

Although the EEOC's investigation initially focused on Starke, it subsequently was expanded to include other female drivers who either had worked with the same male drivers or who had filed internal discrimination complaints. Pet. App. 171a-180a. To that end, the EEOC requested (and CRST provided) contact information for all female drivers and student drivers employed by the company during a two-year period. Pet. App. 177a, 179a-180a.

Approximately two months later, the EEOC issued a Letter of Determination notifying CRST that the agency had reasonable cause to believe the company had subjected Starke and "a class of employees and prospective employees" to sexual harassment, although it did not identify the individuals composing, or the size of, the alleged class. Pet. App. 180a. The letter invited CRST to participate in the conciliation process, to which CRST responded by requesting a meeting and expressing its desire to reach a voluntary resolution. *Id.*

The EEOC refused to meet with CRST until it submitted a conciliation "proposal." Pet. App. 181a. When pressed by CRST to present its own conciliation demand, the EEOC responded by phone that it would seek the appointment of a monitor to "examine the employer's workplace to discover and eliminate sexual harassment, and relief for the class." Pet. App. 182a. When CRST asked for more information about the class, the EEOC responded that it "was not able to provide the names of all class members . . . or an indication of the size of the class," *id.*, but that it would "require as part of conciliation that CRST send a letter to past and present employees to help identify class members so settlements could be paid to them." *Id.* Shortly thereafter, CRST notified the EEOC that given the agency's failure to provide critical information regarding the class, it did not see a meaningful path to successful conciliation. That, in turn, prompted the EEOC to declare conciliation a failure. Pet. App. 182a-183a.

The EEOC subsequently filed suit alleging that Starke and "a class of similarly situated female employees" were subjected to a sexually hostile work environment and that CRST had failed to prevent and correct the harassment. Pet. App. 183a (citation omitted). Again, the EEOC declined to identify the size or composition of the alleged victim class. Pet. App. 186a-187a. Although the class initially appeared to be "relatively small," Pet. App. 187a, it later became clear to the district court that the EEOC "did not know how many allegedly aggrieved persons on whose behalf it was seeking relief [and that it] was using discovery to find them." Pet. App. 188a. During discovery, the agency mailed close to 3,000 letters to former female CRST employees inviting them to participate in the suit. *Id.* With CRST in the

unenviable position of facing a "continuously moving target of allegedly aggrieved persons," the court set a firm deadline for the EEOC to identify its class. Pet. App. 188a-189a.

When the deadline arrived, the EEOC had identified approximately 270 women, a figure that increased dramatically as the deadline approached. Pet. App. 189a. Even after the deadline had passed, the EEOC advised CRST that its "[i]nvestigation is continuing," Pet. App. 190a (citation omitted), and that it planned to amend its list as its "investigation and discovery ... is conducted." Pet. App. 190a n.16 (citation omitted). In the end, the EEOC made only 150 women available for deposition, and the court limited any recovery to those individuals. Pet. App. 192a. The court eventually ruled, through a series of dispositive motions, that the EEOC was barred from seeking relief for the majority of the women, including Starke. Pet. App. 192a-193a.

As to the remaining 67 individuals, the trial court ordered the EEOC to identify, with respect to each aggrieved person, the date on which a charge was filed and investigated, as well as the dates of the EEOC's Letter of Determination and on which conciliation was attempted. The EEOC disclosed to the court that while a handful of the women did file EEOC charges at various points, one did not allege sexual harassment at all. It also admitted that it did not independently investigate any of the 67 individuals' sexual harassment allegations, did not issue reasonable cause findings, and did not attempt conciliation as to those claims. The agency further conceded that to the extent it looked into the individual allegations at all, it was only in the context of investigating the Starke charge. Pet. App. 204a-206a.

CRST subsequently filed a Motion for Order to Show Cause why the EEOC's claim on behalf of the remaining 67 women should not be dismissed on the ground that the agency had failed to fulfill its pre-suit administrative obligations. Pet. App. 193a. The trial court granted the motion, ruling that the EEOC had "wholly abandoned" its statutory duty to investigate and conciliate the claims of all 67 women prior to instituting its lawsuit. Pet. App. 204a.

Thereafter, CRST moved for an award of attorney's fees, arguing that the EEOC's actions in bringing the case were frivolous, unreasonable, and without foundation. Pet. App. 11a. Applying the standard for awarding attorney's fees to prevailing defendants in Title VII cases established by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the district court determined that such an award was warranted because "[t]he EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's prerequisites to suit." *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564, at *7 (N.D. Iowa Feb. 9, 2010), *vacated by* 679 F.3d 657 (8th Cir. 2012). Accordingly, it ordered the EEOC to reimburse CRST approximately $4.5 million, which represented only a portion of the attorney's fees and other costs it incurred to defend the agency's lawsuit. *Id.* at *20.

On appeal, the Eighth Circuit affirmed dismissal of the 67 individual claims, agreeing with the district court that "the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women ...." Pet. App. 115a-116a. It also affirmed summary judgment on the merits as to all but two claims. Pet. App. 114a. Because those two claims were remanded

to the district court, the Eighth Circuit vacated the award of attorney's fees and costs to CRST without prejudice to reinstatement. Pet. App. 156a.

On remand, the EEOC voluntarily withdrew one of the individual claims and settled the other, but in doing so, agreed that CRST could renew its request for attorney's fees. Pet. App. 9a. The trial court once again found that the EEOC's litigation conduct was frivolous and unreasonable, and awarded CRST a total of $4,189,296.10 in attorney's fees, $413,387.58 in out-of-pocket expenses, and $91,758.46 in taxable costs. Pet. App. 84a-85a. Dissatisfied with the trial court's ruling, the EEOC appealed for a second time to the Eighth Circuit, contending that it – and not CRST – was the "prevailing party" for attorney's fees purposes. Pet. App. 17a-18a.

On appeal, the Eighth Circuit rejected the EEOC's contention that its class-based lawsuit – which was brought on behalf of at least two individuals – represented only one "claim." Pet. App. 17a-18a. At the same time, it found that the agency never formally asserted that CRST was engaged in a pattern-or-practice of sex discrimination. Pet. App. 18a. Accordingly, to the extent that the district court merely assumed that the EEOC's lawsuit encompassed such a claim, and awarded attorney's fees on that basis, the Eighth Circuit held that the judgment was erroneous. *Id.*

Second, the Eighth Circuit found that the district court erred in construing the dismissal of the EEOC's individual claims for failure to satisfy its statutory pre-suit obligations as a decision on the merits. Pet. App. 23a-24a. It reasoned that because compliance with pre-suit administrative requirements is not an element of a substantive discrimination claim, a ruling

that the EEOC failed to do so cannot constitute a decision on the merits for attorney's fees purposes. *Id.* Accordingly, it found that CRST was not a "prevailing party" and thus was not entitled to an attorney's fees award. *Id.* After its petition for rehearing *en banc* was denied, CRST filed a petition for writ of certiorari, which this Court granted on December 4, 2015.

SUMMARY OF ARGUMENT

The Eighth Circuit incorrectly held that prevailing defendants are not entitled to an award of attorney's fees and costs pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, in the absence of a judicial determination on the merits, and that dismissal of an action brought by the U.S. Equal Employment Opportunity Commission (EEOC) for failure to comply with its statutory pre-suit obligation to investigate and conciliate does not constitute a "merits" decision. Because it is contrary to Title VII's text, policy aims, and purposes and is inconsistent with this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the decision should be reversed.

The EEOC was created by and is charged with enforcing Title VII, which prohibits discrimination in the terms, conditions or privileges of employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute establishes "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote

omitted)). Although it is authorized to initiate civil actions against employers it believes to have violated the Act, the EEOC may not do so unless and until it has discharged its statutory pre-suit administrative requirements, including completing an investigation of the charge. 42 U.S.C. § 2000e-5(b).

Title VII expressly authorizes courts to award a prevailing party, "other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs ...." 42 U.S.C. § 2000e-5(k). It places no conditions on the court's discretion to award such fees, except to specify attorney's fees are not available if the prevailing party is either the EEOC or another federal government agency. *Id.*

In *Christiansburg*, this Court held that unlike prevailing plaintiffs, prevailing *defendants* may be awarded reasonable attorney's fees and costs under Section 706(k) only if the claim is found to have been "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422. The Court found that the heightened standard was necessary so as not to discourage plaintiffs from pursuing meritorious claims for fear of losing and, as a result, having to reimburse the defendant employer its fees and costs – which likely could far exceed the plaintiff's own costs, as well as the value of his or her claim. At the same time, the Court recognized that by allowing courts to award fees to prevailing defendants, Congress "also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420.

Other than clarifying the standard under which a prevailing defendant's request for attorney's fees should be evaluated, *Christiansburg* does not impose any limitations on the availability of such awards, and

certainly does not restrict attorney's fees to cases in which the merits were fully adjudicated. To the contrary, *Christiansburg* itself involved a claim for attorney's fees based on dismissal of an EEOC suit on procedural grounds. Thus, the decision below, which purports to absolve the EEOC of any liability for a prevailing defendant's attorney's fees in cases dismissed based on anything other than a final adjudication of the discrimination claim on the merits, is irreconcilable with Title VII's plain text and this Court's interpretation of it in *Christiansburg*.

There are many sound policy reasons for allowing prevailing defendants to recover reasonable attorney's fees incurred defending an ultimately unsuccessful EEOC lawsuit based on claims that were never subjected to administrative review, including to disabuse any notion that such "legal lapses and violations ... have no consequence." *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1652-53 (2015). Indeed, in its zeal to litigate large, high profile class-based suits, the EEOC's enforcement priorities seemingly have focused less on informal resolution of discrimination charges, as contemplated by Title VII, and more on developing and maintaining a broad, class-based litigation docket. Such conduct should not be tolerated by the courts, and surely was in this case sufficiently unreasonable, frivolous and baseless to justify awarding reasonable attorney's fees and costs to the prevailing defendant.

ARGUMENT

I. THE DECISION BELOW, WHICH PURPORTS TO ABSOLVE THE EEOC OF ANY LIABILITY FOR ATTORNEY'S FEES IN CASES RESOLVED AGAINST IT ON PROCEDURAL GROUNDS RATHER THAN ON THE MERITS, HAS NO BASIS IN TITLE VII AND CONFLICTS WITH THIS COURT'S DECISION IN *CHRISTIANSBURG GARMENT CO. v. EEOC*

The Eighth Circuit below incorrectly held that attorney's fees may not be awarded to a prevailing defendant under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, in the absence of a judicial determination on the merits. Neither the statute's plain text nor this Court's holding in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), restricts a court's discretion to award reasonable attorney's fees and costs in cases involving unreasonable litigation conduct leading to dismissal on procedural grounds – here, the U.S. Equal Employment Opportunity Commission's (EEOC) failure to investigate, issue a determination, and attempt conciliation prior to bringing suit. Accordingly, the decision below is erroneous and should be reversed.

A. Title VII Does Not Limit The Award Of Attorney's Fees And Costs To Parties Who Have Prevailed On The Merits

Enforced by the EEOC, Title VII prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Section 706(k) of the statute contains a fee-shifting provision that permits a court to award a prevailing party reasonable attorney's fees:

> In *any* action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (emphasis added).

Other than conferring upon courts the discretion to award attorney's fees to a prevailing party, Section 706(k) does not otherwise limit the specific circumstances under which such awards are warranted. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). Thus, nothing in the statute differentiates between cases resolved on substantive grounds and those resolved on procedural grounds regarding the availability of attorney's fees.

B. This Court's Ruling in *Christiansburg Garment Co. v. EEOC*, Which Established The Standard For Awarding Attorney's Fees To A Prevailing Defendant, Involved Underlying Claims That Were Dismissed On Procedural Grounds

This Court has held with respect to a fee-shifting provision that is materially indistinguishable from Section 706(k) that prevailing plaintiffs "'should ordinarily recover an attorney's fee unless special

circumstances would render such an award unjust.'" *Christiansburg*, 434 U.S. at 416-17 (quoting *Newman v. Piggie Park Enters, Inc.*, 390 U.S. 400, 402 (1968)). In *Christiansburg Garment Co. v. EEOC*, this Court enunciated a different standard for determining whether a prevailing *defendant* in a Title VII action is entitled to recoup its reasonable attorney's fees and costs. 434 U.S. 412 (1978). It held that a prevailing defendant is entitled to an award of attorney's fees and costs when a court finds that the claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The Court reasoned that a heightened burden is necessary so as not to "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* At the same time, it observed that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420. The Court also noted that Title VII's attorney's fee provision "explicitly provides that 'the Commission and the United States shall be liable for costs the same as a private person.'" *Id.* at 423 n.20 (citation omitted). Thus, it found "no grounds for applying a different general standard whenever the Commission is the losing plaintiff." *Id.*

Christiansburg involved a civil action filed by the EEOC two years after the plaintiff received, but failed to act on, a right-to-sue notice advising her of the agency's disposition of her discrimination charge. When the plaintiff initially filed her administrative charge with the EEOC, Congress had not yet amended Title VII authorizing the agency to sue in its own name on behalf of discrimination victims. Once Congress did so, *see* Equal Employment Opportunity Act of 1972,

Pub. L. No. 92-261, 86 Stat. 103 (1972), the EEOC commenced a civil action based on the earlier-filed charge. The employer moved for summary judgment, arguing among other things that the charge had not been "pending" as of the date the EEOC obtained litigation authority and thus could not form the basis of an EEOC lawsuit.

After its motion was granted, the employer moved for an award of attorney's fees pursuant to Section 706(k). The district court found that because the EEOC's "action in bringing the suit cannot be characterized as unreasonable or meritless," 434 U.S. at 415, the defendant was not entitled to an award of attorney's fees. On appeal, the Fourth Circuit affirmed.

The question before this Court in *Christiansburg* was not whether Section 706(k) applies only in cases adjudicated on the merits. Rather, it was "what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant* in a Title VII action." *Id.* at 417. Rejecting the EEOC's contention that attorney's fees are available to prevailing defendants only where the unsuccessful plaintiff is found to have brought the claim in bad faith, the Court instead adopted a less stringent standard that respects Congress's desire "to clear the way for suits to be brought under the Act," *id.* at 420, while at the same time "protect[s] defendants from burdensome litigation having no legal or factual basis." *Id.* In affirming the trial court's decision, the Court credited its conclusion that the EEOC's action was not frivolous because it was based on a novel issue of law regarding the proper construction of the 1972 Amendments.

The fact that the underlying complaint in *Christiansburg* was dismissed on procedural grounds

has been lost on the EEOC, which in its brief to this Court misconstrues its holding as follows:

> Petitioner contends that *Christiansburg* supports its position here because the basis for attorney's fees in that case was not a merits determination, but a finding that no charge was pending with the EEOC when the EEOC obtained the right to sue in its own name in 1972. But this Court did not uphold an award of attorney's fees on that basis; rather, the courts below *declined* to award attorneys' fees and this Court affirmed that determination.

EEOC Br. Opp. Cert. at 14. Of course, as noted, the prevailing defendant's motion for attorney's fees in *Christiansburg* was denied *not* because of the procedural posture of the case, but because the EEOC's prosecution – which raised novel questions regarding the scope of its brand-new litigation authority – was not, in the Court's view, "unreasonable or meritless." 434 U.S. at 415 (citation and internal quotation omitted).

In this case, the Eighth Circuit concluded that, for purposes of determining whether a prevailing defendant should be awarded attorney's fees, "proof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." Pet. App. 18a (citation omitted). And according to the EEOC, "The determination that the plaintiff's legal position was 'frivolous, unreasonable, or groundless' depends on an assessment of the merits of the plaintiff's claims for relief." EEOC Br. Opp. Cert. at 10 (citation omitted).

Such an interpretation does not square with Title VII's text or with this Court's analysis in

Christiansburg. Even if that view were facially plausible, it still should not operate to preclude recovery of attorney's fees in a case like this one, in which the merits of the class members' claims were *never* assessed by the EEOC at the administrative stage. CRST was required to devote inordinate time and resources to defend class-based claims that the EEOC concedes were not fully developed even well after the agency's suit was filed.

Under the EEOC's reading of Title VII and *Christiansburg*, an employer like CRST that is hauled into court by the EEOC on an unevaluated suspicion – essentially, a hunch – of discrimination would have to forgo its right to challenge the agency's compliance with its pre-suit statutory obligations, *see Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), instead expending substantial resources in discovery to support a dispositive motion seeking dismissal of the action on the merits. Assuming the EEOC were unsuccessful in its efforts to "fish" for claims during discovery, the employer's motion likely would be granted, and only then would it be permitted to move for attorney's fees. The employer will have spent tens or hundreds of thousands, if not millions, of dollars defending claims that may never have been brought had they been subjected to a proper administrative investigation. Such a result is contrary to the policy considerations made by Congress and elucidated in *Christiansburg* in favor of allowing the recovery of attorney's fees by prevailing defendants.

II. THE EEOC'S FAILURE TO INVESTIGATE AND MAKE FACTUAL DETERMINATIONS AS TO INDIVIDUAL CLAIMS AT THE ADMINISTRATIVE STAGE RENDERS ITS SUBSEQUENT, CLASS-BASED SUIT UNREASONABLE ON ITS FACE

In this case, as in far too many others, "when the complaint was filed, the EEOC had failed to identify the class of victims who could be entitled to monetary relief ...." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152 (4th Cir. 2014). It could not identify the victim class because it failed to investigate whether or not any woman other than Starke had, in fact, been subjected to conduct giving rise to a colorable sex discrimination claim. That the EEOC would commence a civil action in federal court on behalf of the purported victim class despite *never* having independently assessed whether and to what extent any individual other than Starke stated a plausible claim of sexual harassment smacks of unreasonableness, and the Eighth Circuit erred in disallowing an award of attorney's fees to the prevailing defendant on that basis. Accordingly, the decision below should be reversed.

A. Under Title VII, The EEOC's Authority To Sue Is Conditioned Upon Fulfillment Of All Pre-Suit Administrative Requirements, Including Reasonable Investigation Of The Underlying Charge

Unlike private litigants, the EEOC has a special obligation to carefully evaluate the facts of every case and seek informal resolution of meritorious claims *before* undertaking costly and resource-intensive litigation. Its failure to do so, coupled with an adverse

outcome in court, should be more than sufficient to give rise to an attorney's fees sanction under *Christiansburg*.

This Court has observed that Title VII sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Once a charge has been filed, Title VII provides that "the Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof." 42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation, but not the authority to litigate. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

"Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act." *Occidental Life*, 432 U.S. at 368 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission ...." 29 C.F.R. § 1601.15(a) (emphasis

added). Whenever the agency "completes its investigation . . . [and finds] no[] reasonable cause to believe that an unlawful employment practice has occurred or is occurring *as to all issues addressed in the determination*, the Commission shall issue a letter of determination" to that effect. 29 C.F.R. § 1601.19(a) (emphasis added). Where the EEOC does find reason to believe discrimination occurred, the EEOC may issue a determination "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a); only when the EEOC is "unable to obtain voluntary compliance," 29 C.F.R. § 1601.25, through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. § 1601.24; *see also* 42 U.S.C. § 2000e-5(b).

Accordingly, the EEOC's pre-suit administrative process involves several distinct stages: (1) providing notice of the charge; (2) undertaking an investigation; (3) conducting a post-investigation determination of the merits of the charge; and (4) if reasonable cause is found, attempting to eliminate unlawful practices through conciliation. *Id.* Nevertheless, "Each step in the process – investigation, determination, conciliation, and if necessary, suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977); *see also EEOC v. Bloomberg LP*, 967 F. Supp. 2d 802, 810 (S.D.N.Y. 2013); *EEOC v. Jillian's of Indianapolis, Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003). In addition, the "completion of the full administrative process is a prerequisite to the EEOC's power to bring suit in its own name." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981); *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

1. The scope of an EEOC lawsuit cannot exceed that of the underlying charge investigation

The EEOC generally is permitted to pursue in litigation any suspected violation that grows out of facts uncovered during a "reasonable investigation" of the underlying discrimination charge. *See EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992). This "reasonable investigation" rule restricts the EEOC from altogether circumventing Title VII's "integrated, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62 (citation omitted), by including in a lawsuit claims that were never subject to an investigation, reasonable cause determination, and conciliation. *See Delight Wholesale Co.*, 973 F.2d at 668-69; *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1264 (D. Colo. 2007); *Jillian's*, 279 F. Supp. 2d at 979-81 (S.D. Ind. 2003); *see also EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 671 (S.D. Tex. 2014) (noting that the EEOC "can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process") (citations omitted). To permit otherwise would offend this Court's, and Congress's, insistence that Title VII's "overall enforcement structure [should be] a sequential series of steps beginning with the filing of a charge with the EEOC." *Occidental Life*, 432 U.S. at 372.

"Thus, while '[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged,'" it 'must discover such individuals and wrongdoing *during the course of its investigation.*'" Pet. App. 109a (citations omitted). Indeed, even as the Eighth Circuit

below acknowledged, "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation." Pet. App. 110a (citations omitted).

Lower courts therefore have made abundantly clear that an EEOC lawsuit must be "the product of the investigation that reasonably grew out of the underlying charges," as distinguished from facts gathered for the first time in litigation. *Jillian's*, 279 F. Supp.2d at 980. In short, the EEOC may not use discovery "as a fishing expedition" to uncover violations. *EEOC v. Harvey L. Walner Assocs.*, 91 F.3d 963, 971-72 (7th Cir. 1996).

2. *Mach Mining* is inapposite

In *Mach Mining v. EEOC*, this Court held that courts may review the sufficiency of the EEOC's compliance with its mandatory, pre-suit conciliation obligations. 135 S.Ct. 1645 (2015). Acknowledging that Title VII gives the EEOC broad discretion regarding what matters to conciliate and when to conclude such efforts, the Court also found that Congress did not leave all pre-suit matters to the EEOC's sole discretion. For instance, if the EEOC made no effort whatsoever to conciliate prior to filing suit, "Title VII would offer a perfectly serviceable standard for judicial review: Without any 'endeavor' at all, the EEOC would have failed to satisfy a necessary condition of litigation." *Id.* at 1652.

The Court explained that Title VII's conciliation provision – specifically, its "conference, conciliation and persuasion" language – provides a concrete

roadmap as to what constitutes an adequate conciliation effort on the EEOC's part. Those terms "necessarily involve communication between parties, including the exchange of information and views," *id.*, on the alleged discriminatory employment practice. Accordingly, in order to meet its conciliation obligation, the EEOC "must tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id.*

While helpfully outlining a standard under which EEOC conciliation efforts are to be assessed, *Mach Mining* does not reach the question presented here, that is, whether a prevailing defendant's entitlement to attorney's fees is dependent upon a judicial determination on the merits, nor does it address the consequences of the EEOC's failure to *investigate* individual claims prior to filing a class-based lawsuit. Thus, the EEOC's claim that *Mach Mining* "confirms the correctness of the court of appeals' ruling" in this case, EEOC Br. Opp. Cert. at 9, is incorrect.

B. The EEOC Filed Suit Without Any Evidence In Hand To Support Its Class-Based Discrimination Claim

It follows that dismissal of an EEOC lawsuit based on claims that were not subject to proper investigation justifies an award of attorney's fees under *Christiansburg*. In particular, when the EEOC files suit without first having determined whether the evidence it needs to win actually exists, the lawsuit cannot be considered anything but lacking foundation,

and the agency's actions deemed both frivolous[2] and unreasonable. As the Fourth Circuit has observed:

> No doubt Congress was aware that assessing attorneys' fees against the EEOC when it brings a groundless suit might provide a disincentive for the agency to litigate meritorious cases. But it was not unreasonable for Congress to expect the Commission, with its store of expertise and experience, to recognize a baseless suit before being told the same by a federal court. For this reason, "[w]hen a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging."

Propak Logistics, Inc., 746 F.3d at 155 (citation omitted).

In *EEOC v. Propak Logistics, Inc.*, the Fourth Circuit affirmed an attorney's fee award to a prevailing defendant in a class action brought by the EEOC, finding that "the EEOC acted unreasonably in filing the employment discrimination complaint, because events that occurred during the EEOC's administrative investigation precluded the EEOC from obtaining either injunctive or monetary judicial relief." 746 F.3d 145, 147 (4th Cir. 2014). It credited the trial court's conclusion that the EEOC's lawsuit "effectively was moot at its inception," *id.* at 152, in part, because the agency had failed through its administrative investigation to identify a specific class of victims entitled to monetary relief. *Id.* The Fourth Circuit found that the trial court's decision to award attorney's fees to the prevailing defendant "reflected proper consideration of

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[2] The term "frivolous" is defined as "[l]acking a legal basis or legal merit; not reasonably purposeful." Black's Law Dictionary (10th ed. 2014).

the *Christiansburg* standard by assessing whether the EEOC acted unreasonably in initiating the litigation." *Id.* (footnote omitted).

Here, the EEOC accused CRST of violating Title VII by maintaining a sexually hostile work environment as to a substantial number of women. Yet, because it failed to investigate all but one of the women's claims, the EEOC could not have gone into court with any evidence with which to establish a prima facie case of sexual harassment as to the alleged class. In *Harris v. Forklift Systems, Inc.*, this Court held that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." 510 U.S. 17, 21 (1993) (citations omitted).

In *Faragher v. City of Boca Raton*, the Court further explained:

> [I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'

524 U.S. 775, 787-88 (1998) (citations and quotations omitted); *see also, e.g., Hockman v. Westward*

Communs., LLC, 407 F.3d 317, 326 (5th Cir. 2004) (the conduct in question "must be 'so severe [or] pervasive that it destroys a protected classmember's opportunity to succeed in the work place'") (citation omitted). In this case, the EEOC admittedly conducted no investigation to determine whether any of the class members, other than Starke, could assert even a colorable claim of sexual harassment. Despite having no factual or legal foundation on which to build its case, the EEOC nevertheless proceeded to court – only to have all but one claim dismissed with prejudice.

> No reasonable jury could have found the evidence in this case sufficient to sustain a Title VII claim, and the EEOC, which is charged with enforcing the nation's employment laws, should have recognized that fact. Rather than do so, the EEOC continued to press a baseless claim long after it should have been dismissed, imposing upon [CRST] years of litigation at enormous expense, both in terms of time and money. Disallowing attorneys' fees and expenses under the circumstances of this case would constitute a manifest injustice.

EEOC v. W. Customer Mgmt. Grp., LLC, 2014 WL 4409920, at *5 (N.D. Fla. July 28, 2014), *report and recommendation adopted in part*, 2014 WL 4435980 (N.D. Fla. Sept. 8, 2014), *appeal dismissed*, No. 15-13649 (11th Cir. Oct. 22, 2015); *see also EEOC v. Global Horizons, Inc.*, 100 F. Supp. 3d 1077, 1079 (E.D. Wash. 2015) ("To balance Title VII's purpose with the need to ensure that businesses are not forced to litigate baseless discrimination claims, Congress imposed a statutory duty on the EEOC to provide notice to an employer of the charged discriminatory practice, investigate the charge, and conciliate with

the business before filing a lawsuit. Title VII and Supreme Court case law encourages the EEOC to utilize these processes to ensure that a lawsuit is filed reasonably, with foundation, and is not frivolous, imposing a potential award of attorney's fees against the EEOC if it files a lawsuit that did not meet these standards").

The EEOC possesses (perhaps above all other would-be plaintiffs) sufficient "expertise and experience[] to recognize a baseless suit before being told the same by a federal court." *Propak*, 746 F.3d at 155. For that reason, the agency should not be permitted to escape unpunished for pressing claims that, had it complied with its administrative requirements, it would have discovered are meritless. As the district court noted, "When it is the EEOC, as opposed to an individual, bringing suit, Title VII imposes an additional claim to relief. That is, in addition to proving the usual elements of a sexual harassment claim, the EEOC must also establish that it pursued an administrative resolution." Pet. App. 58a-59a.

Therefore, in deciding whether or not fees should be awarded to a prevailing defendant in such a case, courts can and should evaluate the extent to which the agency's non-compliance at the administrative stage rendered a subsequent lawsuit baseless or unreasonable. "Although the Court is not reviewing the individual sufficiency of the EEOC's reasonable-cause determination or conciliation process, the Court must consider the information discovered (or failed to be discovered) during these processes in order to assess whether the EEOC filed the lawsuit with foundation or whether the filing was reasonable or frivolous." *Global Horizons*, 100 F. Supp. 3d at 1080.

C. The EEOC's Failure To Conciliate Any Of The Class Members' Claims Prior To Suit Merely Compounded Its Unreasonable Conduct

The EEOC's failure to investigate all but one of the purported claims on which it brought suit in turn prevented it from making sound factual determinations and engaging in meaningful conciliation as to meritorious claims, which only compounded the unreasonableness of its actions in this matter. *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003). The importance of proper charge investigation to meaningful fulfillment of the EEOC's statutory conciliation duties is profound. *See EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added).

Accordingly, when the EEOC wholly abandons its responsibility to investigate, as it did here, the agency undermines its own ability to perform the next steps in the process. The investigation serves as the foundation for all that comes after, and without it, the agency deprives the employer of any meaningful opportunity to conciliate a claim in lieu of litigation.

As the Ninth Circuit observed in *Pierce Packing*:

> The Commission's functions of investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe that Congress directed the Commission to make a determination of reasonable cause on the merits of a charge and nevertheless contemplated that the Commission could institute such litigation before it makes such a determination. Similarly, it is difficult to conclude that Congress directed the Commission to conciliate and then

> authorize it to initiate adversary proceedings before the possibility of voluntary compliance has been exhausted.

EEOC v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982) (citation omitted).

In this case, the "procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history. The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness." *Id.* at 609 (citation omitted). Among other things, the EEOC admitted that it conducted *no investigation* into any of the 67 claims that survived discovery, and that roughly one-third of those claims did not even arise until *after* the agency's civil complaint was filed. Pet. App. 204a-205a. Of the 40 women whose claims did emerge prior to suit, the EEOC actually knew about only two of them going into court, and resorted to discovery to find the others. Pet. App. 205a.

When the EEOC presses in litigation claims that (1) were not developed in an investigation and thus were not ripe for meaningful conciliation discussions and (2) it should have known were destined to fail for lack of evidence, the prevailing employer should not, in the end, be left holding the bag.

III. PERMITTING THE EEOC TO AVOID ATTORNEY'S FEES SANCTIONS FOR PURSUING PREDICTABLY UNSUCCESSFUL LITIGATION PREMISED ON UNINVESTIGATED DISCRIMINATION CLAIMS DEFEATS THE PURPOSES AND OBJECTIVES OF TITLE VII AND DISADVANTAGES EMPLOYERS AND EMPLOYEES ALIKE

> [Regardless of the potential] public policy reasons for exercising caution when considering an award of attorneys' fees against a plaintiff, as well as the implications of such an award against the EEOC, [courts must remain mindful] of the impact baseless lawsuits have on employers and businesses, particularly when they are backed by the full force, and seemingly unlimited purse, of the government.

EEOC v. W. Customer Mgmt. Grp., LLC, 2014 WL 4409920, at *5. Indeed:

> Many employers are inclined to conciliate and settle as it is often more efficient than ultimately winning a case on the merits. The current statutory scheme places an employer in the predicament of attempting to amiably negotiate with an agency whose principles are sometimes best served by making an example of an employer. Logically, expending resources defending invalid lawsuits may have the effect of hiring reductions, downsizing and even possibly forcing small companies out of operation. Furthermore, the negative stigma of discrimination claims can foreseeably injure a company's reputation, recruiting and ability to conduct normal day-to-day business.

Anthony P. Zana, *A Pragmatic Appreach to EEOC Misconduct: Drawing A Line on Commission Bad Faith in Title VII Litigation*, 73 Miss. L.J. 289, 319-20 (2003) (footnotes omitted).

The *Christiansburg* standard itself "reflects a determination to head off unjustified litigation." *Propak Logistics, Inc.*, 746 F.3d at 155. Litigation that is procedurally infirm can be, and often is, extremely damaging to the defendant, regardless of the merit (or lack thereof) of the underlying claim. Moreover, "A party forced to defend against a groundless lawsuit is prejudiced every bit as much if the litigation is brought by a federal agency as if it were commenced by a private party." *Id.*

> The EEOC in particular brings suit against a wide range of employers for whom the defense of lawsuits may be prohibitively expensive. *Christiansburg* was sensitive to this problem, noting that 'many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights.'

Id.

The EEOC's current enforcement strategy places particular emphasis on class-based systemic and pattern-or-practice discrimination litigation.[3] In its

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[3] According to the EEOC's Strategic Enforcement Plan (SEP) for Fiscal Years 2013–2016, of particular interest to the EEOC are "issues that will have broad impact because of the number of individuals, employers or employment practices affected." U.S. EEOC, Strategic Enforcement Plan FY 2013–2016, at III.A.1., *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Jan. 25, 2016).

Strategic Enforcement Plan (SEP) for Fiscal Years 2013-2016, for instance, the EEOC has committed to progressively increasing the percentage of systemic cases on its active litigation docket each fiscal year.[4] To that aim, the agency has established a specific, numerical quota that it expects its enforcement staff to meet, largely ignoring objections from the business community that such an approach would encourage hasty, insufficient systemic charge investigations and detract from meaningful, pre-suit settlement efforts.[5] Although the EEOC's current SEP requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets, it gives no indication whatsoever that pre-suit charge resolution or meaningful investigation are agency priorities or even significant concerns. Such policies incentivize staff to bypass investigation and pre-suit conciliation in favor of high-profile, class-based lawsuits that are likely to end, as this one did, in dismissal. Even if the case eventually produces some measure of victim-specific relief, it typically is at the expense of the individual charging party whose original claims often remain pending for years.

To the extent that the EEOC has formalized enforcement tactics that are at odds with the purposes

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[4] U.S. EEOC, SEP FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Jan. 25, 2016).

[5] The agency has met or exceeded the SEP active systemic litigation targets in the last two fiscal years. *See* U.S. EEOC, Fiscal Year 2014 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2014par.pdf (last visited Jan. 25, 2016) and U.S. EEOC, Fiscal Year 2015 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf (last visited Jan. 25, 2016).

and objectives of Title VII, it is now more important than ever that the courts retain the discretion to sanction the agency for such litigation abuses. A particularly effective deterrent is the award of attorney's fees to a prevailing defendant where it is determined that the EEOC's failure to investigate results in the filing, and eventual dismissal, of a groundless lawsuit.

Moreover, as noted above, although the EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge, the agency must actually investigate prior to suit in order to invoke that rule. *See Delight Wholesale Co.*, 973 F.2d at 668-69. Notwithstanding Title VII's mandate that the EEOC must investigate and conciliate prior to resorting to litigation, the agency in recent years has embarked on a disturbing pattern of "naming everyone and asking questions later." Pet. App. 190a (citation and internal quotation omitted). *See also Propak Logistics, Inc.*, 746 F.3d at 152-54 (dismissing class lawsuit because EEOC had not identified a specific class of victims during its investigation); *EEOC v. Freeman*, ___ F. Supp. 3d ___, 2015 WL 5178420, at *1 (D. Md. Sept. 3, 2015) (finding that the EEOC acted unreasonably in proceeding with litigation even after defendant "revealed the inexplicably shoddy work" of its expert witness); *Bloomberg*, 967 F. Supp. 2d at 816 (S.D.N.Y. 2013) (recognizing "where, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief . . . and dismiss the EEOC's Complaint"); *Jillian's*, 279 F. Supp. 2d at 980 (granting summary judgment in favor of employer on nationwide class allegations because "[t]he EEOC's investigation of the

four charges was conducted entirely with respect to Jillian's Indianapolis. Its Amended Complaint, alleging a nationwide class, has insufficient basis in its actual investigation").

The EEOC's rush to litigate claims that it never examined at the charge investigation stage, or never attempted to resolve through conciliation, confirms *amici*'s growing concern that the agency effectively has abandoned its commitment to pursue meaningful administrative charge resolution, choosing instead the more expedient, high-profile litigation route. Indeed, *amici* are extremely troubled by the EEOC's recent efforts to expand its own authority under Title VII, while at the same time working to sharply curtail the role of the courts in policing its enforcement activities. *See, e.g.*, *Mach Mining*, 135 S. Ct. at 1650 (where the EEOC argued unsuccessfully that its pre-suit conciliation efforts are not subject to any measure of judicial review); *Propak Logistics, Inc.*, 746 F.3d at 149-150 (where the EEOC argued unsuccessfully that the doctrine of laches can never be applied when the government is the plaintiff). Allowing the decision below to stand would invite the EEOC to ignore its statutorily-mandated pre-suit requirements without any meaningful repercussions. As this Court observed in *Mach Mining*, "[w]e need only know – and know that Congress knows – that *legal lapses and violations occur, and especially so when they have no consequence*." 135 S. Ct. at 1652-53 (emphasis added).

Title VII actions often are complex, time-consuming, and very costly to defend. This is especially true of the substantial number of Title VII cases brought against small to mid-sized employers whose litigation resources often pale in comparison to those of the federal government. *See Christiansburg*, 434 U.S. at 423 n.20

(noting that "many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights"). The rule created by the court below, if allowed to stand, essentially would create a "get out of jail free card" for the EEOC — leaving a prevailing defendant on the hook for substantial attorney's fees and costs for claims that never should have been brought in the first place. *See, e.g.*, Pet. App. 84a (awarding CRST $4,189,296.10 in attorneys' fees, $91,758.46 in costs, and $413,387.58 in out-of-pocket expenses); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587, 591-92 (6th Cir. 2013) (affirming lower court's order that EEOC reimburse employer nearly $800,000 in attorney's fees and costs in having to defend against Title VII lawsuit that EEOC continued to pursue even after it should have known it had no merit); *EEOC. v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. Aug. 16, 2012) (upholding award of over $750,000 in attorney's fees and costs because the EEOC knew or had reason to know that its lawsuit was "frivolous, unreasonable, and without foundation").

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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